SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, ET AL.,

Petitioners.

- against -

GEORGE K. WYMAN, ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

A. RELEVANT DOCKET ENTRIES

1969, April 9th: Complaint filed. Summons issued.

1969, April 10th: By Weinstein, J. Order To Show Cause filed with proof of service thereon why a preliminary injunction should not be granted enjoining defendant Wyman, etc., from taking any steps toward implementing and from putting into effect the system of "maximum monthly grants" and schedules of need prescribed by N.Y. Social Services Law Sec. 131-a, etc. (returnable April 15, 1969 at 10:00 A.M.)

1969, April 15th: Motion and memorandum of law filed, to convene three-judge court. 4/15/69

1969, April 15th: Before Weinstein, J. – Motion for preliminary injunction etc. adjd to Apr. 18, 1969 at 2:00 P.M.

1969, April 15th: By Weinstein, J. – copy of telegraphic message sent to Hon. Robert Finch, Secty H.E. – & W. Washington, D.C. re: preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, filed.

1969, April 15th: By Weinstein, J. — Copy of telegraphic message sent to Hon. John Mitchell, Atty Gen., Washington, D.C. re: preliminary hearing set for 2:00 P.M. April 18, 1969 filed.

1969, April 18th: Before Weinstein, J. — Hearing on motion to convene three-judge Court — Court grants leave to defts to move to implead U.S.A. as a party deft — if papers are served no later than 5:00 P.M. April 21, 1969. Hearing continued to April 23, 1969 at 2:00 P.M.

1969, April 23rd: Before Weinstein, J. — Hearing on motion for preliminary injunction etc. resumed — Motion to dismiss as to National Welfare Organization and City-Wide Co-ordinating Commission for lack of standing — Case now to be captioned Rosado v. George K. Wyman — Motion granted — Motion by State of New York to bring in the Health Welfare and Education as a party deft — Motion

denied – Hearing continued to April 24, 1969 at 12:00 Noon.

1969, April 23rd: By Weinstein, J. — Memorandum & Order filed (Standing of Organizations) Defts' motion to dismiss as to the two Organizational pltffs for lack of standing is granted. The Clerk is directed to strike the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations from the caption of this case. Henceforth, this case should be referred to as Rosado, et al. v. Wyman, et al. 69-C-355. So ordered. (See opinion & order)

1969, April 23rd: By Weinstein, J. — Memorandum & Order (Necessary party) filed. Decision rendered, Defts' motion to join H.E.W. as a necessary and indispensable party is denied. So Ordered. (See memo and Order)

1969, April 24th: Before Weinstein, J. — Hearing on preliminary injunction etc. Findings of fact were read into record by the Court — and renders its decision — Temporary restraining order granted — and granting motion for 3 judge Court — Temporary restraining order in effect until 3 Judge Court convenes — Court will file findings of fact and order — Hearing concluded.

1969, April 24th: By Weinstein, J. –Temporary Restraining Order filed. It is ordered that, pending hearing and determination by a statutory three-judge court deft Wyman etc. are hereby restrained etc.

1969, April 24th: Copy of letter to Judge Lumbard from Judge Weinstein dated April 24th, 1969 re: recommending appointment of a three-judge Court. filed.

1969, April 24th: By Weinstein, J. — Memorandum & Order — Three-Judge Court and Temporary restraining order. filed. Decision rendered, the defts' motion for the convening of a three-judge court and pltffs' motion for temporary restraining order are granted. Defts and pltffs are advised to have their papers seeking summary judgment and all other relief served and filed on April 29, 1969. The parties

are granted until May 2, 1969 to submit reply papers and briefs. All undecided motions will be referred to the three-judge court. SO ORDERED. (P/C mailed to attys)

1969, April 25th: By Lumbard, Ch Judge U.S. Court of Appeals, designating Hon. Jack B. Weinstein, to hear and determine said cause: Hon. Leonard P. Moore, Hon. Jacob Mishler. SO ORDERED. (P/C mailed to attys) (copy of order sent of Judge Mishler, Judge Weinstein, and mailed to Judge Moore)

1969, April 25th: Motion filed to join additional party.

1969, April 28th: Letter to Judge Weinstein, from U.S. Dept. of Justice, dated April 23, 1969 filed.

1969, April 30th: Motion filed pursuant to Rule 56, and defts' memorandum of law for summary judgment in favor of defts etc.

1969, April 30th: Answer of defts filed.

1969, April 30th: Motion and pltffs' memorandum filed pursuant to Rule 56, for summary judgment in favor of pltffs and for a permanent injunction etc.

1969, May 2nd: Supplemental statement as to material facts filed.

1969, May 2nd: Before Moore, C.J. – Mishler, J. – Weinstein, J. – Hearing on motion for summary judgment held. Motion argued – Decision reserved.

1969, May 12th: By L. P. Moore, C. J. — Mishler, J. — Weinstein, J. — Memorandum & Order filed. It is ordered that the three-judge court heretofore convened be and is dissolved and that the matter be and is remanded to the single judge to whom the complaint was originally presented for such further proceedings as are appropriate. SO ORDERED. (See memo & order) (P/C mailed to attys)

1969, May 12th: By Weinstein, J. — Memorandum & Order filed. The three-judge court in this action has been dissolved etc. Since the order issued on April 24, 1969, etc. is no longer in force, a new temporary restraining order in iden-

tical terms will be issued pursuant to Rule 65 etc. So ordered. (See memo and order) (P/C mailed to attys)

1969, May 12th: By Weinstein, J. - Temporary Restraining Order filed, etc.

1969, May 15th: Copy of letter to Hon. L. P. Moore, Mishler, J. Weinstein, J., from Center on Social Welfare by Lee A. Albert dated May 6, 1969.

1969, May 15th: By Weinstein, J. — Memorandum & Order filed, for decision on summary judgment & temporary injunction. Parties will submit proposed orders for a preliminary injunction by 4:30 P.M. on Fri. May 16, 1969. (See memo and order)

1969, May 16th: By Weinstein, J. Order filed pursuant to this Court's Order & Memo of May 15, 1969 the temporary restraining order is incorporated in and shall be a preliminary injunction adopted pursuant to Rule 65 preliminary injunction is effective until final decision on the merits of this case. Pltff shall file security in the sum of \$1,000.00. Defts motion for a stay of this preliminary injunction is denied (see order attached on file of May 12, 1969) (P/C mailed to attys)

1969, May 19th: Notice of Appeal filed

1969, June 18th: State administrative materials promulgated pursuant to section 131-a submitted by pltffs on June 10, 1969 filed.

1969, June 18th: Before Weinstein, J. – Hearing on motion for summary judgment held and concluded – Court's oral findings of fact and conclusions of law – Motion for summary judgment granted to pltffs – Enjoins defts from implementation of Sec. 131a of the Social Service Law as amended – Denied defts' motion for a stay of permanent injunction – Order on oral decision and findings of fact as modified orally to take effect immediately – Court denied the stay in all respects upon application by defts. Pltffs to submit an order for signature at 4:30 P.M. in accordance with Judge's decision – Court directed defts to file a notice

of appeal before 4:30 P.M. (June 18, 1969) in accordance with defts objections in the judge's findings.

1969, June 18th: By Weinstein, J. – Memorandum & Order filed. Pltffs' motion for summary judgment is granted. SO ORDERED. (See opinion and order) (P/C mailed to attys)

1969, June 18th: By Weinstein, J. — Order Filed, that deft Wyman, his successors in office, etc., are hereby enjoined from implementing or utilizing said Sec. 131-a and, pursuant thereto, from denying, reducing or discontinuing any benefits in the form of either regular recurring grants or special grants now available to receipents of Aid to Families with Dependent Children in New York (including the quarterly "flat grant" in New York City and special grants throughout the State). This order shall take effect immediately.

1969, June 18th: By Weinstein, J. – This order is stayed until 4:00 P.M. on June 19, 1969. SO ORDERED. (Order endorsed at foot of above order) (P/C mailed to attys)

B. COMPLAINT (Document No. 1) UNITED STATES DISTRICT COURT Eastern District of New York

National Welfare Rights Organization, Citywide Coordinating Committee of Welfare Organizations, and Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Plaintiffs,

- against -

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George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Department of Social Services for the State of New York,

Defendants.

I

Plaintiffs on behalf of themselves and all other persons similarly situated seek to have this court declare invalid reductions in the amounts of public assistance grants mandated by New York Social Services Law § 131, as amended Laws Ch. 184, March 31, 1969, and § 131-a, added Laws Ch. 184, March 31, 1969 (set forth in Exhibit A herein), and to enjoin said reductions, on the ground that such reductions are inconsonant with the Social Security Act, 42 U.S.C. §§ 301 et seq. and the regulations promulgated thereunder.

In addition, plaintiffs seek a declaration that the aforesaid Sections 131 and 131-a are in violation of the Fourteenth Amendment to the Constitution of the United States insofar as said sections have the effect of denying equal protection of the law.

II

PRELIMINARY STATEMENT

On March 29, 1969 the Legislature of the State of New York enacted § 131-a which reduces by significant amounts the "standards of need" and actual grants to be paid to public assistance recipients in New York, as hereinafter more fully set forth. Such reductions were made pursuant

to express legislative findings in the Act of a "spiraling rise of public assistance rolls and the expenditures therefor," the "economic concern of the people of the State of New York," and the necessity for the legislature to set "the costs of delivering the needs of public assistance recipients in the respective social services districts of the states." Law Ch. 184, § 1, March 31, 1969.

The aforesaid standards and maximum grants will be fully impemented on July 1, 1969. On the same date, adjustments upwards of standards and grant maximums, based upon the rise in the cost of living, are required to become fully operative under Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23) [hereinafter sometimes referred to as Section 402(a)(23)]. This federal law, which was enacted January 2, 1968, requires that the standards and maximums then in effect be increased by July 1, 1969 while the New York statute requires the op-

posite result.

The New York Act is in direct conflict with the requirements of federal law, denies recipients of public assistance in New York the protections and entitlements afforded them by federal law, and causes serious and irreparable harm to said recipients. Moreover, as hereinafter more fully set forth, the New York requirements unreasonably and irrationally limit standards and maximums of grants to recipients who reside in Nassau County and elsewhere outside of New York City to levels significantly lower than those applicable to recipients who reside in New York City despite similarity in living costs. The latter distinctions violate federal statutory requirements mandating uniform standards of need and maximum grants throughout the state, set forth hereinafter and, additionally, the Equal Protection Clause.

Ш

JURISDICTION

The jurisdiction of the Court is based upon:

- (a) 28 U.S.C. \$\frac{1}{2} 1331, 1337 and 1343.
- (b) 28 U. S. C. §§ 2201 and 2202.
- (e) 42 U.S.C. §§ 1983 and 1988.
- (d) United States Constitution, Article VI and the Fourteenth Amendment.

The amount in controversy, exclusive of interests and costs, exceeds \$10,000.

IV

STATEMENT OF CLAIM

- 1. Pursuant to the Social Security Act of 1935, 42 U.S.C. §§ 301 et seq., New York cooperates with the Federal Government in providing public welfare assistance to needy persons under a New York "state plan," consisting of state statutes and regulations and approved by the United States Department of Health, Education and Welfare. In order to participate in said program New York must comply with all pertinent federal statutes and regulations.
- 2. Pursuant to the state plan, eligible individuals receive regular recurring semi-monthly or monthly checks for food, rent and other items of basic subsistence.
- 3. Prior to September 1968, all recipients in New York State were also eligible for "special needs" grants to provide for lacking, deteriorated or outgrown items of furniture, clothing, kitchen supplies, and other items. The

provision for such grants recognized that the "regular and recurring" grant did not provide sufficient monies to recipients to permit them to purchase or replace the needed items which were the subject of the "special needs" grants.

- 4. Among other things, the "special needs" grants provided monies for the purpose of:
- (a) Supplying families with an amount for home furnishing and clothing consistent with a minimal standard of health and decency at the time a family began receiving public assistance and from time to time thereafter.
- (b) Replacing essential items of home furnishings and clothing as they became worn out, unsafe, or a hazard to health.
- (c) Providing for telephones for those persons demonstrating medical or other necessity, special diet requirements pursuant to doctor's orders, restaurant meals for those unable to cook at home, travel for welfare and medical business, layette for newborn infants, job-hunting expenses, school fees, burial expenses, and so forth.
- 5. On August 27, 1968, as the result of a substantial increase in special needs grants in New York City because of proper payments for legitimate needs, the City effectuated under the guise of a "demonstration project," a substantial reduction in its expenditures and in the amounts paid to many needy families by eliminating all special needs grants for clothing and household furnishings and providing instead a "special flat quarterly grant" totaling \$100 per year per recipient allegedly to cover the cost of such items. Said "special flat quarterly grant" is an addition to the "regular and recurring" grant. Recipients continued to remain eligible for grants for the items of special need enumerated in paragraph (4)(c) above.

- 6. The so-called "special flat quarterly grant" at no time applied to persons residing in counties of New York State other than those constituting the City of New York. Recipients outside of New York City continued to be eligible for all special needs grants. Thus plaintiffs herein Duffy and Phillips continued to receive grants for special needs under existing § 131 of the Social Services Law.
- 7. On or about March 29, 1969, the New York State Legislature, which had previously authorized the State Department of Social Services to establish grant levels, adopted Social Services Law § 131-a and set its own standards of need and maximum grants, exclusive of rent and fuel, for persons living in New York City as follows:

Number of persons in Household

For each additional One Two Three Four Five Six Seven person \$70 \$116 \$162 \$208 \$254 \$297 \$340 \$43

and the following standards of need and maximum grants for recipients outside of New York City:

Number of persons in Household

For each additional One Two Three Four Five Six Seven person \$60 \$101 \$142 \$183 \$224 \$257 \$290 \$33

As the result of this enactment, the amount for which plaintiffs qualified under law are substantially reduced, as is demonstrated in the tabulation set forth subsequently herein. These reduced "maximum monthly grants" will become effective July 1, 1969, and the New York State

Department of Social Services is now taking the appropriate administrative steps to allow for effective and complete implementation throughout the State by July 1, 1969

- 8. By adopting Section 131-a, the Legislature lowered the standards and significantly reduced the grants available to recipients in the following way, among others:
- (a) Cost of living increments which had been added to the "regular and recurring" grants subsequent to the enactment of Section 402(a)(23) in January, 1968 are wiped out for numerous families, and the families reduced below standards existing in July 1967.
- (b) The "special flat quarterly grant" for New York City residents is abolished.
- (c) All "special needs" grants for recipients living anywhere in New York State are eliminated.
- (d) Recipients living in certain places outside the City of New York, such as Plaintiffs Duffy and Phillips who reside in Nassau County and who presently receive "regular and recurring" grants equal to those living in New York City because of equally high or higher living costs, are even further reduced in the standards and grants.
- 9(a) On January 2, 1968, the Social Security Act was amended by the addition of Section 402(a)(23), which in its entirety requires that the States:

"provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

(b) The United States Department of Health, Education and Welfare has adopted the following regulation pursuant to Section 402(a) (23):

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 C.F.R. § 233.20(a) (2) (ii), 34 Fed. Reg. 1394 (1969).

(c) Section 402(a) (23) imposes two discrete obligations on the states and contemplates a necessary two-step operation by the States to bring about the mandated results on July 1, 1969. (1) The States shall take the necessary steps so that standards of need "will have been" adjusted to reflect fully changes in living costs. (2) "maximums that the state imposes on the amount of aid paid . . . will have been proportionately adjusted." Recognizing that an adjustment in standards of need in light of changes in cost of living necessarily requires study and analysis of changes in living costs and that the adjusted standard resulting from such study and analysis requires state legislative change and substantial administrative adjustment. Congress provided the period from January 1968 to July

- 1969. Congress therefore mandated immediate preparation of adjustments in the standards used to determine need so that by July 1, 1969, the amounts paid to families with dependent children would reflect fully changes in living costs since the state standard had last been adjusted prior to January 2, 1968, when Section 402(a) (23) became law.
- (d) The cost of living in the New York City Metropolitan area (including Nassau County) has risen 7.7% from July 1967, the last date prior to January 2, 1968, when welfare benefits were increased by New York, until February 1969. Section 131-a effectuates a substantial reduction, however, rather than the federally mandated increase.
- (e) New York has taken final legislative action in enactment of its annual budget for the fiscal year 1969-1970 which offends the two federal requirements in Section 402(a) (23). Ignoring the applicable 7.7% increase in living costs. New York has redetermined the needs of individuals downwards during the very period of federal obligation in which the State must adjust need standards to reflect fully changes in costs of living. Based upon this unlawful redetermination of needs of individuals. New York has further mandated dollar maximums on the amounts of aid to be paid as of July 1, 1969, when the federal statute requires that any such maximums will have been proportionately adjusted to reflect the rise in living costs. In so doing New York has mandated a result to obtain on July 1, 1969, flatly contrary to the result specified in Section 402(a) (23) for that very date.
- (f) New York has until now determined on some allegedly factual basis the needs of various families and then paid that family the amount needed, taking into account other resources of the family such as earned income and

OASDI benefits. On information and belief, no factual study or attention to actual need whatever underlay the setting of the "maximum monthly grants" by the legislature, although the statute says that "such schedules shall be deemed to make adequate provision for all items of need." Rather the sole concern of the legislature was the "costs of delivering the needs of public assistance recipients," in light of the "spiraling rise of public assistance rolls and the expenditures therefore. . . ." Laws Ch. 184, § 1, March 31, 1969.

10(a) United States Department of Health, Education and Welfare regulation requires that state plans must:

"Provide that the standard [of assistance] will be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(2)(iii), 311 Fed. Reg. 1394 (Jan. 29, 1969) and

"Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly State-wide." 45 C.F.R. § 233.20(a)(2)(viii), 311 Fed. Reg. 1394 (Jan. 29, 1969).

- (b) The standards of assistance and maximum grants adopted by the Legislature in Section 131-a do not apply uniformly, nor are the discriminations in amounts granted based on any rational consideration of living costs. For example, the living costs of plaintiffs and their class who are residents of Nassau County are as high or higher than those experienced by residents of New York City and public assistance grants to them were equal.
- 11. The current standard of assistance falls far short of that necessary to maintain health and decency, as all

studies of this field confirm. The individuals and families on public assistance who now live from hand to mouth are now being buffeted by spiraling inflation and an increase in the regressive sales tax. The reductions described herein threaten profound irreparable injury in that the reduced grants do not provide plaintiffs and their class with the amount needed to subsist. This induces recipients to cut back on current expenditures to save against the decline in assistance grants as costs rise.

- 12. The reduction in the standard of need will render ineligible for aid needy persons whose income and other resources were just below welfare standards and will now equal or exceed the reduced standard.
- 13. Unless this Court declares the reduction invalid and enjoins the implementation thereof, the aforementioned unlawful result will obtain on July 1, 1969, and the Legislature will be unable to act in timely fashion to comply with the requirements of Section 402(a)(23).

V

PLAINTIFFS

- 1.(a) Plaintiffs are all citizens of the United States and reside in the State of New York. Plaintiffs bring this action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all New York individuals and families similarly aggrieved by the unlawful reduction of public assistance grants pursuant to Section 131-a of the New York Soical Services Law in violation of the Social Security Act and federal regulations.
- (b) Plaintiffs Duffy and Phillips are members of an additional class of recipients of public assistance residing

in Nassau County, and other urban and suburban counties other than those within the City of New York, whose grants have been reduced below those of persons with identical need in the City of New York in violation of the Social Security Act and regulations promulgated thereunder, and the Fourteenth Amendment to the Constitution of the United States.

- (c) Plaintiffs bring this action as a class action because the questions of fact and law are common to the plaintiffs and the class they represent, the members of the class are so numerous as to make joinder of parties impracticable, the claims of the plaintiffs are typical of the claims of all members of the class, the plaintiffs fairly and adequately represent the claims of all the members of the class, the defendant is acting on grounds generally applicable to the entire class, the questions of law and fact common to the class predominate over any questions affecting individual members, and class action will best provide for a fair and efficient adjudication of this controversy.
- 2. The New York City Plaintiffs are presently receiving regular monthly amounts for AFDC as set forth below and are prohibited from receiving more than the following amounts under the challenged statute. All amounts are exclusive of rent.

Plaintiff	Current Monthly Grant	Maximum Grant Under § 131-a
Rosado	\$280	\$254
HERNANDEZ	\$218	\$162
MILEY	\$535	\$469
ABROM	\$406	\$340
GATHERS	\$382	\$340
LOWMAN	\$396	\$383
KING	\$482	\$426
Folk	\$337	\$208

3. The Nassau County Plaintiffs are presently receiving the following amounts exclusive of rent. Needy individuals in Nassau County presently receive assistance at the same levels as individuals in New York City. Under the challenged law these plaintiffs will receive assistance at the lower rates provided for all recipients residing outside New York City.

	,	§ 131-a	\$ 131-a
	Current	NY State	NY City
Plaintiff	Monthly Grant	Maximum	Minimum
PHILLIPS	\$314.40	\$224	\$254
DUFFY	\$563.40	\$389	\$469

- 4. Plaintiff National Welfare Rights Organization was formed in 1967 by recipients of public assistance to enable them to learn of their rights and entitlements and to organize and to teach individuals in need of financial assistance how they might go about getting the needed relief. The membership of NWRO includes more than 30,000 households, and 200 affiliated groups in 70 communities in 37 states.
- 5. Plaintiff City Wide Coordinating Committee of Welfare Organizations was formed in 1966 by welfare recipient for the purpose of assisting all needy individuals to receive the grants to which they are legally entitled. City-wide is the coordinating agency for neighborhood welfare organizations in New York City and it has over 4,000 members.

VI

DEFENDANTS

1. The Defendant State Department of Social Services, under New York Social Services Law § 20, has primary

responsibility for promulgating regulations and instituting procedures for the administration and distribution of public assistance in New York State, in accordance with the requirements of the federal Social Security Act, the Social Services Law of New York, and the Constitutions of New York and the United States.

2. Defendant George K. Wyman, as Commissioner of the Department of Social Services of the State of New York, has primary responsibility for the administration of that Department in compliance with the law. New York Social Services Law, § 34.

VII

As a first cause of action, plaintiffs allege:

- Section 402(a)(23) of the Social Security Act requires that:
 - ". . . by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established . . ."
- 2. By enacting Section 131-a, New York State has set standards which are "deemed to make adequate provisions for all items of need. In fact this legislation constitutes a downward revision in standards in direct violation of Section 402(a)(23) and therefore should be declared invalid and defendants should be enjoined from implementing such reduction for plaintiffs and members of their class, pursuant thereto.

VIII

As a second cause of action, plaintiffs allege:

- 1. Section 402(a)(23) of the Social Security Act provides that:
 - "... by July 1, 1969, ... any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted [to the cost-of-living increase]."
- 2. Section 131-a, in adjusting maximums on the amounts paid to plaintiff families, in accordance with redeterminations of need which reflect anything but "changes in living costs," thereby reducing actual benefits paid, is in direct violation of Section 402(a)(23) and therefore should be declared invalid and defendants should be enjoined from implementing such reduction of benefits pursuant thereto.

IX

As a third cause of action, plaintiffs allege:

- 1. The regulations of the Department of Health, Education and Welfare, 45 C.F.R. § 233(a)(2)(ii), 34 Fed. Reg. 1394 (1969) provide that in making the cost-of-living adjustment
 - ". . . a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. . . ."
 - 2. Section 131-a constitutes such a forbidden "reduction in the content of the standard," in that it eliminates provision for major items of clothing and furniture which is now made through special needs grants outside New York City and the \$100 per year "special flat quarterly grant" in New York City. Amounts contained in the regular recurring grant to provide for the greater expenses of feeding and clothing older children are also eliminated.

Grants available throughout the State for telephones, special diets, expenses incident to employment, age, disability, pregnancy, education and training, replacement of lost or stolen checks, moving expenses, rent security, extermination, etc., are now impermissible.

3. Section 131-a is indirect violation of the federal regulation and therefore should be declared invalid and defendant should be enjoined from implementing a reduction of benefits pursuant thereto.

X

As a fourth cause of action, plaintiffs allege:

- 1. Section 131-a violates the Social Security Act of 1935 and the regulations made pursuant thereto because it is not a plan of uniform statewide application in that public assistance recipients in Nassau County and other non-New York City areas are singled out for special, unfavorable and discriminatory treatment.
- 2. Section 402(a)(1) of the Social Security Act, 42 U.S.C. § 602(a)(1), requires that a state plan "shall be in effect in all political sub-divisions of the state, and, if administered by them, be mandatory upon them." As interpreted by the Department of Health, Education and Welfare in its "Handbook of Public Assistance Administration" (the binding federal regulations of the United States Department of Health, Education and Welfare), the statute requires that the plan "shall . . . provide for administration in accordance with standards that are mandatory and equitable throughout the State." Pt. II § 4200(1) (1964).

3. On January 29, 1969 the Department of Health, Education and Welfare promulgated 45 C.F.R. § 233.20, 34 Fed. Reg. 1394, which provides in pertinent part:

§ 233.20 Need and Amount of Assistance

- a) Requirement for State Plans. A State Plan for OAA, AFDC, AB, APTD OR AABD must, as specified below:
 - General. Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis. . . .
 - Standards of Assistance. (i) Specify a Statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.
 - (iii) Provide that the standard will be uniformly applied throughout the State.
- 4. Although the legislative findings and purpose of the March 29, 1969 Act state that the reductions "will promote greater uniformity and equality of treatment," plaintiffs Phillip and Duffy, both residents of Nassau County, will receive substantially less public assistance under Section 131-a than persons identically situated but living within New York City.
- 5. The cost of living in Nassau County is as high as in New York City. The United States Department of Labor in its statistical analysis of the cost of living makes no distinction between costs in New York City and neighboring counties. The same supermarket chains and department stores service both areas and charge substantially

the same prices for all items including basic necessities in both New York City and Nassau County.

- 6. Defendant Wyman recognized this absence of cost of living differential in promulgating Section 352.4 of Title 18 of the New York Code, Rules and Regulations which established identical standards of need for public assistance recipients living in New York City and Nassau County.
- 7. On information and belief, there was neither experience, information or evidence brought before either house of the New York State legislature or any committee thereof justifying or warranting a legislative finding that there was an actual cost of living differential between New York City and Nassau County.
- 8. Section 131-a is in direct violation of the federal requirement that standards will be uniformly applied throughout the State, in that it sets different and lower standards for residents of Nassau County and elsewhere without regard to their equal need, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

XI

As a fifth cause of action, plaintiffs repeat and reallege the allegations contained in counts one through four hereof with the same force and effect as if herein fully set forth, and allege:

1. Section 131-a has set schedules of grants and "deem[s]" them "to make adequate provision for all items of need." This was done for the sole purpose of saving money without regard to the actual cost of living in

the State and without consideration of objective studies which are required by the various federal regulations previously set forth.

2. Section 131-a is in direct violation of the requirements of the Social Security Act and the regulations adopted thereunder, and therefore should be declared invalid and defendants should be enjoined from implementing a reduction of benefits pursuant thereto.

XII

As a further claim for declaratory relief, plaintiffs Phillips and Duffy, on behalf of all members of their subclass residing in Nassau County repeat and reallege the allegations contained in count four herein with the same force and effect as if herein fully set forth, and allege:

- 1. There is no legitimate or rational purpose served by discriminating against public assistance recipients living outside of New York City, and more particularly in Nassau County.
- 2. Section 131-a denies plaintiffs Phillips and Duffy and all members of their sub-class the equal protection of the laws in violation of the Fourteenth Amendment and therefore should be declared invalid.

XIII

Plaintiffs have no adequate remedy at law. Defendant will continue to cause, and threaten to cause, irreparable injury unless enjoined forthwith.

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated, that this Court:

1. Enter preliminary and permanent injunctions enjoining the defendant, his successors in office, agents and em-

ployees, and all other persons in active concert and participation with them, from enforcing or taking any steps in any way toward implementing, and from putting into effect, the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, on the ground that said grants and schedules are in violation of and inconsistent with the requirements of the federal Social Security Act and regulations promulgated thereunder.

- 2. Enter a declaratory judgment holding that the said New York Social Services Law § 131-a violates the federal Social Security Act and regulations promulgated thereunder and is therefore invalid in that it redetermines need standards downward rather than upward in accordance with changes in living costs as required, creates maximums which decrease rather than increase the amounts paid to families, and contracts the content of the standard of need, and sets standards without objective study.
- 3. Enter a declaratory judgment holding that New York Social Services Law § 131-a denies plaintiffs residing in the Greater New York area but outside the City of New York rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States, the federal Social Security Act and regulations promulgated thereunder, insofar as the said Section 131-a reduces benefits for persons in the greater New York City area but outside the City of New York even further than for City residents despite the similarity in needs and cost, of living for the two groups of recipients.
- 4. Allow plaintiffs their costs herein and grant them and all other persons similarly situated such additional or alternative relief as the Court may deem to be just and appropriate.

C. ORDER TO SHOW CAUSE (Document No. 3)

[Title Omitted in Printing]

Let Defendants show cause in Courtroom No. 10 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn New York, on the 15th day of April 1969, at 10:00 a.m. or as soon thereafter as counsel may be heard, why a preliminary injunction should not be granted enjoining defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, from taking any steps toward implementing and from putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law § 131-a, added by Laws Ch. 184, March 31, 1969, on the ground that implementation of such system and schedules will result in reduction of benefits in violation of Section 402 (a) (23) of the federal Social Security Act. 42 U.S.C. 602 (a) (23), and related sections, and regulations promulgated thereunder.

Plaintiffs have alleged that they are suffering, and are threatened with, irreparable injury as the result of the pending implementation of the said New York Social Services Law § 131-a, in the annexed complaint and affidavits of Louise Lowman, dated April 6, 1969; Sophia Abrom, dated April 6, 1969; Anne Lou Phillips, dated April 7, 1969; Marjorie Duffy, dated April 7, 1969; Eula Mae King, dated April 8, 1969; Cathryn Folk, dated April 6, 1969; Marjorie Miley, dated April 6, 1969; Julia Rosado, dated April 7, 1969; and Lydia Hernandez, dated April 7, 1969. It is also alleged in the annexed affiducit of Lee A. Albert, an attorney for plaintiffs. duted April 9, 1969, that immediate action is required prior to the ar ment of the Lan before April 25. 1966 so that the increases in benefits mandated by the alimental Startiers, ware (an) (23) may be in mented by fluity II. 194411 & respuise

IT IS COUNTIED that service of the Chales on defendants at their New York City of see at 270 Broadway, New

York New York, or upon the Attorney General of the State of New York, at his office at 80 Centre Street, New York, on or before 12:00 Noon on the 10th day of April, 1969, be deemed sufficient.

IT 13 FURTHER ORDERED that service of this Order be made by any of the attorneys for plaintiffs in this action.

J. B. Weinstein United States District Judge

Dated: Brooklyn N.Y. April 9, 1969

D. NOTICE OF DEFENDANTS' MOTION TO CONVENE THREE JUDGE COURT (Document No. 6)

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE that the defendants will bring on for hearing before the United States District Court in Room 10, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on April 15, 1969 at 10:00 A.M. or as soon thereafter as counsel may be heard a motion for convening a statutory court of three Judges for the purpose of hearing and determining the issues raised by the complaint in this action:

Dated: New York, New York April 11, 1969.

Yours, etc.,

Louis J. Lefkowitz Attorney General of the State of New York Attorney for Defendants E. Telegram from Judge Weinstein to Hon. Robert Finch, Secretary, Health, Education & Welfare (Document No. 8)

April 15, 1969 1:05 P.M

Honorable Robert Finch Secretary, Health, Education & Welfare Washington, D.C.

Preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, at Courtroom 10, United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in case of National Welfare Rights Organization, et al., plaintiffs against George K. Wyman, et al., defendants, 69-CIV-355 challenging validity of New York State welfare laws under the Federal Constitutional Statutes and Regulations. This case may ininvolve interpretation of federal statutes and regulations. You are requested to appear as a friend of the court if you wish to do so. Copies of this telegram sent to Attorney General of United States, Attorney General of the State of New York, United States Attorney for the Eastern District of New York and Lee Albert Esq., Attorney for plaintiffs.

Jack B. Weinstein
Judge, U.S. District Court
Eastern District of New York

F. Telegram from Judge Weinstein to Hon. John Mitchell, Attorney General (Document No. 9)

April 15, 1969

Honorable John Mitchell Attorney General of the United States Washington, D.C.

THE FOLLOWING TELEGRAM WAS SENT TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE OF THE UNITED STATES:

Preliminary hearing set for 2:00 P.M. Friday, April 18, 1969, at Courtroom 10, United States District Courthouse, 225 Cadman Plaza East, Brooklyn, New York, in case of National Welfare Rights Organization, et al., plaintiffs against George K. Wyman, et al., defendants, 69-CIV-355 challenging validity of New York State welfare laws under the federal constitutional statutes and regulations. This case may involve interpretation of federal statutes and regulations. You are requested to appear as a friend of the court if you wish to do so. Copies were sent to the Attorney General of the State of New York, United States Attorney for the Eastern District of New York and Lee Albert, Esq., Attorney for plaintiffs.

Jack B. Weinstein Judge, U.S. District Court Eastern District of New York

G. Notice of Defendants' Motion To Join Additional Party (Document No. 23)

[Title Omitted in Printing]

SIR:

Please take notice that the defendants, George K. Wyman and the Department of Social Services of the State of New York, move this Court for an order that the Secretary of Health, Education and Welfare of the United States of America be summoned to appear in this action as a party defendant because in his absence complete relief cannot be accorded among those already parties, as will more fully appear from the affidavit attached to this motion.

The Secretary of Health, Education and Welfare can be made a party defendant without depriving this court of jurisdiction of the parties already before it. He is subject to the jurisdiction of this Court.

Dated: New York, New York April 21, 1969

Yours, etc.,
/s/ Philip Weinberg
Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

H. Letter from U.S. Attorney to Judge Weinstein (Document No. 24)

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn N. Y. 11201
April 23, 1969

Honorable Jack B. Weinstein United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

> Re: National Welfare Rights Organization v. George K. Wyman, et al. Civil Action No. 69 C 355

Honorable Sir:

As indicated in our appearance before the Court this afternoon, the Government will be pleased to provide the Court with amicus memoranda upon any points of law which may arise in this proceeding and with respect to which the Court believes that the Government's views are required.

Very truly yours,
VINCENT T. McCARTHY
United States Attorney

By: /s/ Howard L. Stevens Assistant U. S. Attorney I. Revised Memorandum and Order of Judge Weinstein on Standing and Necessary Party (Original Document Nos. 17-18)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

April 23, 1969

Weinstein, D.J.

This is a class action brought by ten recipients of welfare payments under the Aid to Families With Dependent Children Program (AFDC) and two organizations whose stated purpose is to promote the interests of persons on relief—the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations—to declare invalid and enjoin the implementation of the recently enacted amendment to New York's Social Services Law which allegedly cuts substantially the level of welfare payments throughout the state as of July 1, 1969. N. Y. Soc. Serv. § 131-a added by Laws Ch. 184, March 31, 1969.

Defendants have moved to dismiss as to the two organizational plaintiffs for lack of standing and to join the Department of Health, Education and Welfare (H.E.W.) as a party defendant. For the reasons stated below, defendants' standing motion is granted and their joinder motion is denied.

I. STANDING OF ORGANIZATIONS

The general rule is that parties may "rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 318 U.S. 44 (1943); Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298." N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958). See also Alderman v. United States, — U.S. —, —, 89 S. Ct. 961, 966-67 (1969). Applied to organizations, this rule requires, in the absence of special circumstances, that there be an injury to the organization distinct from that to its membership. See, e.g., Griswold v. Connecticut, 381 U.S. 479

(1965) (criminal conviction for aiding and abetting violation of statute); Joint Anti-Fascist Refugee Committee v. Mc-Grath, 341 U.S. 123 (1951) (designation of organization as "subversive"); cf. Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925), But cf. Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 653 (1962).

An exception to this rule has evolved out of a series of cases involving efforts by several states to curtail the activities of the N.A.A.C.P. N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961): Bates v. City of Little Rock, 361 U.S. 516 (1960): N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). The N.A.A.C.P. was permitted to represent the rights of its members in each of these cases, all of which involved the freedom of association, because "liln each . . ., the organization itself was aggrieved by the violation of its members' rights and therefore plainly had the real adversary interest which is basic to the idea of standing." Note, Parties Plaintiff in Civil Rights Litigation. 68 Colum. L. Rev. 893, 919-20 (1968). See N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (statute to prohibit improper solicitation of legal business); Louisiana ex rel. Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961) (statute requiring certain types of organizations to file list of names and addresses of members): Bates v. City of Little Rock, 361 U.S. 516 (1960) (same); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958) (same: "the reasonable likelihood that the association itself through diminished financial support and membership may be effected"). Moreover, except in N.A.A.C.P. v. Button, to require the individual members to come forward and individually assert the right being claimed, "would result in nullification of the right at the very moment of its assertion." N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958).

In the instant case, there are no special circumstances warranting departure from the general rule requiring that there be a distinct injury to the organization. See United States v. Alderman, — U.S. —, 89 S. Ct. 961 (1969). The freedom of association of the members is not involved and no direct injury to the National Welfare Rights Organization or Citywide Coordinating Committee of Welfare Organizations is threatened. Nor is there lack of effective representation, gross adversial inequality, or any practical or theoretical obstacle to the individual plaintiffs' effective assertion of their claims. Cf. Smith v. Board of Education of Morristown School Dist. No. 32, 365 F.2d 770, 776-777 (8th Cir. 1966); Note, Parties Plaintiff in Civil Rights Litigation, 68 Colum. L. Rev. 893, 920 (1968).

While the two organizations may represent a broader class than the individual plaintiffs — those who are not now entitled to receive welfare benefits but who would be if the standards of need were raised as opposed to those now on welfare whose payments will be cut under the amended statute — the relief presently being sought by the individual plaintiffs will inure to the benefit of all those who come within the broader class.

The liberal amended federal class action rules permit the Court to adequately protect those individuals who may be adversely affected by defendants' action even though they are not named as plaintiffs. See Federal Rules of Civil Procedure, Rule 23(c),(d). But cf. Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599, 656 (1962). In any event, the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations will be able to assist the class by appearing as friends of the Court.

Defendants' motion to dismiss as to the National Welfare Rights Organization and Citywide Coordinating Committee of Welfare Organizations for lack of standing is granted. The Clerk of the Court is directed to strike their names from the caption of this case. Henceforth, this case should be referred to as Rosado, et al. v. Wyman, et al., 69-Civ.-355.

II. JOINDER OF H.E.W.

Subdivision (a) of Rule 19 of the Federal Rules of Civil Procedure — the feasible joinder provision of the federal rules — is designed to protect the interests of absent parties as well as those already before the Court from multiple litigation or inconsistent obligations. It provides for the joinder of those persons who fall within either of two categories:

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impeded his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring doubt, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

H.E.W. does not fall within either of these categories. This Court would not "be obliged to grant partial or 'hollow' rather than complete relief to the parties before" it in the absence of the proposed new party. Advisory Committee Notes to Rule 19. Plaintiffs are seeking to invalidate section 131-a so that the present welfare law will remain in effect; they do not seek to cut-off federal funds. Such a remedy is an appropriate one and can be granted in the absence of H.E.W. See, e.g., King v. Smith, 392 U.S. 309 (1968); Westberry v. Fisher, 37 U.S.L. Week 2573 (D. Me. 1969); Williams v. Danridge, - F. Supp. - (D. Md. 1969); cf. Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 117 (1967). In none of the recent challenges to state welfare laws has H.E.W. been made a party. See, e.g., Shapiro v. Thompson - U.S. -, 37 U.S.L. Week 4333 (1969); King v. Smith, 392 U.S. 309 (1968); Westberry v. Fisher, 37 U.S.L. Week 2573 (D. Me. 1969): Williams v. Danridge. - F. Supp. - (D. Md. 1969).

To require plaintiffs to proceed against H.E.W. would place them in the untenable position of being forced to seek a cut-off of all welfare payments in order to challenge a law on the ground that it provides for inadequate payments. Such a rule would only serve to insulate state welfare laws from judicial review by deterring potential plaintiffs from challenging them in the courts.

Defendants do not suggest any possible prejudice to themselves from a failure to join H.E.W. They only contend that since participation in the AFDC program is purely voluntary, a state is not bound by federal standards in fashioning its welfare system and thus plaintiffs should be required to proceed against H.E.W. to force a cut-off of federal funds. This argument is without merit. Although a state has the option of withdrawing from AFDC, it cannot be said to have exercised that option by the passage of a statute inconsistent with federal law in the absence of an express statement of withdrawal by the state legislature. See, e.g., King v. Smith, 392 U.S. 309 (1968).

Nor will H.E.W. be harmed by non-joinder. While it does have an arguable interest in the subject matter of this litigation since it is required to review each state plan to determine whether the plan complies with federal standards and those standards may affect the fiscal contribution of the federal government, H.E.W.'s absence will not, "as a practical matter," impair its ability to protect that interest or expose any of the existing parties to double or inconsistent liability.

Strong support for the lack of prejudice to H.E.W. is suggested by the fact that this agency has opposed the motion to join it as a party. Its interests could be adequately protected, and its position could be made known to the Court, by the filing of an amicus brief. See Lampton v. Bonin, Civ. No. 68-2092, Sec. E. (E.D. La., complaint filed November 14, 1968) (H.E.W. requested to file amicus brief); Jefferson v. Hackney, CA-3012-B (N.D. Tex., complaint filed February 12, 1969) (same). Yet, not only has

it failed to seek the intervention to which it would be entitled (Federal Rules of Civil Procedure, Rule 24), it has refrained from submitting a brief or participating in argument despite repeated requests by the Court that it present its views.

Defendants' motion to join H.E.W. as a necessary and indispensable party is denied.

/s/ J. B. Weinstein U.S.D.J.

J. TRANSCRIPT OF PROCEEDINGS OF APRIL 23, 1969 BEFORE JUDGE WEINSTEIN

(Testimony of Mitchell Ginsberg and Jack Goldberg)
(Document No. 61)

[At Page 72]

MR. ALBERT: Plaintiff wishes to call Mr. Mitchell Ginsberg at this time.

MITCHELL GINSBERG

having been called as a Witness, and being duly sworn by the Deputy Clerk, testified as follows:

THE CLERK: Would you state your full name?

THE WITNESS: Mitchell I. Ginsberg.

DIRECT EXAMINATION

BY MR. ALBERT:

Q. Mr. Ginsberg, would you kindly state for the Court your educational background in social welfare work and public assistance? A. I have an A.B. from the Tufts College in history, an M.A. degree in psychology, and education and an M.S. from the Columbia School of Social Work and I have done a variety of different forms of work in different places.

[73] I have been in the field for 32 years, on an up or down situation, depending upon which point of view, and I have been a professor at the School of Social Work at Columbia University and an associate dean for 14 years.

I have been Commissioner of Social Services in New York City for slightly under two years and for 15 months I have been the administrator of the Human Resources Administration.

I am a consultant to HEW and OEO, and a variety of other organizations of that type.

- Q. Most of this extensive work has been done in the State of New York? A. I've been in New York continually from 1948.
- Q. You are quite familiar with the Public Assistance Program—excuse me, the Public Assistance Administration in New York City, particularly the ADC program. A. Yes, I am.

Q. Could you describe the components of a grant under the present system in the ADC program? A. The basic grant which is given twice a month, bi-weekly, is designed to cover what are considered the ordinary recurring expenses, such as food, clothing and [74] incidental and personal expenses, rent, heat, so forth.

At the present time, New York City has a grant and a feature, which is a cyclical grant, \$100 per member of a family per year, which is designed to meet what formerly was considered certain special expenses, such as clothing and furniture, large items of that sort, because of the feeling that the basic grant as such did not provide adequately for those particular benefits.

So we have this cyclical grant in addition and plus that, there are a number of special grants, such as moving, special diets, certain transportation expenses and items of that nature which are not covered, either, under the basic cyclical grant and based on the specific needs of the individual or family representing the claim.

- Q. Are all of the components of the special grants expressed in terms of amounts of money? A. Yes.
- Q. How in turn, are these amounts determined? A. Well, the basic element in this is of course, the size of the family of the individual involved.

If it is a one-person family—under the present system, the age of the children make a difference in the size of the grant. Within a family of four, the size of the grant differs as to the age of the oldest child [75] in the family.

Q. What is the reason for that? A. The assumption by the State and most of us who have had any experience in this business, the older child, the oldest child is more likely to have expenses which are greater and due to the fact they are in school and school in itself presents certain needs which are more true for school-age children, teen-agers, obviously and therefore, the State has recognized the fact that grants for families should be somewhat higher with older children than those of younger children.

Q. The amounts purport to reflect the cost of these items? A. Yes. On a standard of need.

Q. How do these amounts compare with existing budgettary studies with, say New York City, or New York State? A. Welfare budgets as such, tend to be lower than what most other organizations generally feel is needed.

There have been studies by the Bureau of Labor Statistics, a series of three different levels that they have come

up with. Community Council makes a study.

There is a Community Service Society which has a study and it recommends what it thinks is the [76] appropriate minimum and those are substantially higher.

You do have to remember that the welfare family or individual does receive such things as medical care and does not pay taxes, thus, some adjustment had to be made between the estimates arrived at by these other groups and the actual size of the welfare grant.

Q. Allowing for these adjustments, is it a fact that the welfare grant is significantly less than a projection for low-income family? A. Yes. I know of no study after you have taken into account what I have said, which does not set a level substantially higher than the existing welfare grants.

Q. To what extent do present grants provide for a nutritutional, adequate diet for a family of four? A. I don't claim to be an expert in nutrition and I think there is a difficult problem here in giving any statistical basis on these very few actual studies on this subject that have been done.

There is no question, certainly based on experience of those of us who are in the business, that the diets of people on welfare are, if adequate, are minimally adequate.

There is no question that in terms of people with special needs, pregnancy, diabetes, the problems [77] are aggravated and there is also statistical evidence, for instance, in New York City, and one cannot attribute this to welfare and obviously, many of the people that are on welfare, that the infant mortality rate in New York City is two to three times higher in certain areas which have concentra-

tions of poor people and welfare clients than other areas in the same city, where you don't have the same composition of the population.

[78] Q. Is it a fact that there is not much margin for

flexibility in using one's food money? A. Yes.

I have long felt that one of the most disturbing and difficult aspects of this is that there is no flexibility.

The welfare budget is designed in a sense to be that way, and most of us, if we were in a situation where we have a special need and we want to do something one month or one week against another, we can do it with some reasonable assurance that we can make it up within one month or two months.

That is literally impossible under the welfare system and this complete lack of flexibility which goes so far as not to permit savings accounts, and so forth.

This is one of the present features of the welfare system.

- Q. Are you familiar with the legislative measures passed by the New York Legislature on March 31, 1961, particularly Section 131 A and related provisions? A. Yes, I am.
- Q. Can you describe its impact on the age of dependent children caseloads generally in New York [79] City, financially? A. I would say it has two major aspects, from my point of view, for a substantial majority of those clients, it lowers the level of benefits that they are getting now when you take into account the cyclical grants which will put in for specific purposes, of actual need.

So in that sense, in terms of base of what would be the new basis grant on July 1st, the majority of people under the ADC program, would get less money than they receive under the existing program.

In addition, it takes away a variety of special needs and some of the most disturbing facts are the special diets and it eliminates the moving expenses, expenses in the home such as fumigating the apartment, transportation for illness when necessary, or to visit a relative outside the City. There are a series of those which will be eliminated. Therefore if a client is forced to any one of these things, it would be

necessary to take it out of the reduced allowance and that seems to be the difficulty and undesireability of the recent

legislation.

Q. Putting aside any assessment of reduction from the abolition of special grants, except for the [80] cyclical, which we will consider as a part of the regular grant for this question, can you describe its financial impact in terms of reduction on say, a family of six with an older child?

A. Yes, if I glance at my notes, our estimation is 80% of the current cases, covering 75% of the individuals, will receive less money than they are receiving under the existing program.

As I said, you do have to take a look into a family of six or any size family, at the age of the children involved.

If the oldest child is 20 to 21 and there would be very few of those, the reduction in the grant would be \$780 a year. Where the oldest child is 14 or 15, and it goes on the basis of the oldest child, the reduction would be \$444, intervening at \$660, \$540, \$180 and so forth. It is not until you get down to a situation where the child is—where the oldest child is 10 or 11 and that becomes somewhat difficult when you have more children in the family and then, you get an increase of \$84, so, it's clear, using a six person family, the overwhelming number of them would get less money.

Q. And the impact of larger families than six would be more-

[81] MR. WEINBERG: We object to this testimony. This is supposed to be under the temporary restraining order, which your Honor knows under rule 65 can be for ten days.

Everybody knows this statute cannot taken effect until July 1. I do not want to make objections. It is ludicrous for me to permit this testimony to come in on the question of a temporary restraining order, which I assume is the question we are here to discuss.

The statute is not taking effect for more than two

months.

THE COURT: I have some doubt about maybe you are right that a temporary restraining order can only last for ten days, if it is on notice, and there is a hearing.

MR. WEINBERG: It certainly cannot last any longer than your Honor convenes a three-judge Court or decides not to and decides to go ahead with the preliminary injunction.

That is going to be well before July 1st. I do not see what the cuts affected by [82] the statutes which is not going to go into effect for another two months has to do with this testimony.

THE COURT: Well, one thing. I believe that if there is a three-judge Court, the temporary restraining order may last until the decision by the three-judge Court.

MR. ALBERT: That is correct, your Honor.

THE COURT: Now you know as well as I that some of the decisions of three-judge Courts in this District have come a year or more after the case was argued.

MR. WEINBERG: Of course, that is true, but these Plaintiffs can make an application at the time the three-judge Court is convened, which will certainly be before July 1st.

THE COURT: In addition to that, there is the question which is basic to this hearing, and that is whether the administrative changes which take place in the interim will be irreversible and the problem then is one: What adverse effects may take place after July 1st, because the administrative changes which are made on the [83] assumption that the statute is valid can be changed.

In any event, your objection is overruled. I will hear the testimony.

BY MR. ALBERT:

- Q. Was it your testimony, Mr. Ginsberg, that in addition to the reductions that you just talked about, monetary reductions, there is an abolition of special grants that are now available to deal with items of special need? A. Yes, that is right.
- Q. With regard to those items, each would be expected to use whatever they will get under the new system for those needs? A. There will be no alternative.

If they're forced to move, it costs money to move and they will have to take it out of the only resources they have.

Q. Are these items of special needs now available in widespread use in the City of New York, as for example,

moving expenses? A. Yes, they are.

I believe Commissioner Goldberg can give more information of the exact figures, but as I recall, the total cost for that particular item in the past fiscal [84] year, has been five million dollars.

So-

Q. That is in the City of New York? A. That is right. That's just the City of New York. Therefore, clearly, that is an item of substantial—poor people are forced to move quite often and the kind of housing and the extent of housing available to them is extremely limited.

Q. The grant for rent is unchanged under the new

amendment? A. Yes. That remains as it is.

Q. Does that grant properly calculated leave anything over for food, travel, and the like? A. No, the grant is based on exactly what the rent is charged per person. So, any change in the rent allowance simply means that additional amounts of money goes to the landlord and has nothing to do with what the client has left over.

Q. It is also subject to certain limitations imposed by the Department? A. Yes, that is right, but in any case, it is limited to the exact rent the client is forced to pay.

Q. Assuming these reductions were fully implemented on July 1, what kind of events or harms, in [85] your experience will recipients face or bear when tney are implemented? A. Well, I think that goes back to what I have said about the lack of flexibility. The only item about which conceivably you can argue there is in flexibility is the food item. To a limited extent, I suppose that is true of clothing. That is such a small proportion, it is not meaningful.

Therefore, the only thing that a client will be able to do is to reduce the amount of money spent on food, considering the fact that that is a minimal amount and considering the fact that the cost of living is increasing, going up as it has been recently, and there is no indication of a change in the next few months.

You are going to inevitably be faced by a choice by a client of having less food for himself or herself and the family, or doing without some of these items. Some of which they cannot do without.

So I think the inevitable result will be less food and therefore, it's very clear to me in cases of some of these people that there are bound to be medical effects.

- Q. Is there a grant now available for travel to health care facilities, either for ordinary [86] cases, or for crisis care? A. Yes.
- Q. That would be abolished by the new law? A. Yes, except for prior flood and special emergencies, which I have heard defined as an earthquake.
- Q. Is there a grant available now for special diets for people of proven illnesses and needs? A. Yes, there are, including pregnant women.
 - Q. That will be done away with? A. Yes.
- Q. Is there a grant now incidental to child birth and infancy? A. Yes.
 - Q. Will that be done away with? A. Yes.
- Q. The present grant for furniture and clothing will be done away with also? A. That is included in the cyclical grant and as we understand the cyclical grant, it is being eliminated.
- Q. Is it a fact in your experience, that under the present grant levels, the subject of money is a source of unremitting concern to ADC families, particularly at the end of the month? A. Absolutely.
- [87] As you get closer to the end of the grant, the pressure gets greater. There have been a number of studies of that nature done and a number of reports of that kind, and anybody who has direct contact with welfare clients knows that is the number one cause of concern all the time. But particularly towards the end or latter part of the grant period.

Q. Looking to the present situation today, without the implication of the cutbacks, but the widely publicized threat of them, what kind of events or harms are people likely to be experiencing now from the fact that this statute will be going into effect? A. One of the characteristics of living on welfare is almost the perpetual state of anxiety and tension, because one literally is under pressure day by day, even under the existing system, and the concern as to what will happen next inevitably is going to increase that kind of pressure.

Those of us who have had experience with poor families, families on welfare, know in addition to the financial problems and the problems of potential illness and lack of adequate nutrition, there is the problem of tension on family life and strains on family life which are present all the time, but which in a situation of [88] additional anxiety, because of this concern, there is bound to be increased anxieties and tension and then, there is the problem of children in school, which I think tend to get overlooked.

Children are particularly likely to want to be able to do what other youngsters can do and not be stigmatized or

marked out as being different.

Unfortunately, to a substantial extent, welfare does this, anyway. I see this problem being aggravated and I must say I suppose it's not evidence, but at the time when a country as rich as this, why we shouldn't be doing more for children, this is rather deeply disturbing to me and my colleagues.

Q. What kind of effect does the new legislation have on the moving plans of people for next month? A. If I were—suppose if I were in a situation, and wanted to move before the time comes which would mean I might be faced with a less adequate choice, then I would have later on and would be forced into more undesirable quarters.

In the State of New York, being on welfare is one factor where you can be discriminated against, simply because you are on welfare.

Q. Discrimination is a factor in welfare [89] recipients' lives? A. Yes. There are very documented cases of land-

lords refusing to accept clients simply because they are on welfare.

Q. Do you foresee any effect on this problem of landlord discrimination by reducing the budget on the welfare recipients? A. I assume it is a speculative one, but it has crossed my mind that landlords, knowing this can happen and knowing also there is always a temptation that welfare clients, when pressured by other factors might use up the grants for other situations and presumably, the landlords might decide they are even less desirable as a tenant.

[90] MR. WEINBERG: I move to strike this question

and the previous ones.

I recognize a great deal of leeway is necessary in testimony of this nature. I recognize a temporary restraining order is a discretionary matter and there is no Jury here, and all that.

At the same time we have heard the most speculative imaginable answers, and we have heard conclusions of law. There has to be some outer limit, even in this sort of an application.

THE COURT: They are the opinions of a leading expert and they are acceptable, but I think you ought to drop this line and move to your next line.

You have sufficiently explored it for this purpose.

BY MR. ALBERT:

Q. What is the size of the present ADC caseload in New York City, approximately? A. Approximately 750,000 including mothers and children.

Q. What percentage does that represent of the [91] State in ADC? A. I would guess close to 90% and perhaps 85. New York represents, as I recall, 70 to 75% of the total caseloads and has a great concentration of ADC.

Q. Do existing day care centers allow mothers to work and have children cared for at the centers? A. There is a desperate shortage of day care facilities for children of ADC families. For children of poor families, generally.

So I believe we have the equivalent of 12 or 14,000

youngsters in those day care facilities.

I would estimate at the moment that perhaps 25% of that number are actually the children of ADC families.

Q. Do you foresee any significant changes in the availability of day care centers in the next year? A. Yes. We

would hope to expand them.

Q. Do you foresee any significant expansion? A. Well, I would say it depends one: On primarily the amount of money available for that purpose. We've been urging that more use be made of the Federal funds and secondly: there is a facility problem of finding appropriate space for those programs.

MR. ALBERT: May I consult for a moment, your

Honor?

[92] THE COURT: Yes.

MR. ALBERT: I have no further questions, your Honor.
Will your Honor indulge a very quick question to the
Witness?

THE COURT: Yes.

BY MR. ALBERT:

Q. Mr. Ginsberg, did you testify, under subpoena today?

A. Yes.

MR. ALBERT: Thank you.

CROSS EXAMINATION

BY MR. WEINBERG:

Q. We have heard a lot of testimony from you about the welfare system.

When you are referring to the welfare system in your testimony you mean the welfare system as it is nationwide, administered under the social security law, do you not? A. Yes, both nationwide, and in New York City and State, of which we are obviously a part of that, but I am talking of both the national system across the country as well as it is carried out in the community.

Q. Does the level of benefits in New York [93] State as well as New York City compare favorably or unfavorably?

A. They are higher than most states and cities in the United

States.

- Q. With regard to the changes that are going to take effect when section 131 A takes effect, do you know when that statute is going to take effect? A. As I read the legislation and I must admit, it is somewhat confusing, it is scheduled to take effect on July 1st.
 - Q. 1969? A. Yes, sir.
- Q. Now, the damage that you testified to that is going to result according to your testimony when the statute takes effect, that is by definition going to happen when the statute takes effect or after? A. I tried to make distinctions of two things: One is that some of the concerns I've had about what is happening now in anticipation of those effects, and secondly, some of the specific effects that would be obviously taking place after the cuts have gone into effect.
- Q. But, Commissioner, the thrust of your testimony seemed to be towards what was going to happen when the schedule grants were eliminated for moving, for [94] telephone, for diets, and the like. A. Pardon?
- Q. For diets. A. Oh, I would agree that the more serious effects will be after the cuts have actually gone into operation.
 - Q. Let us analogize this a little further.

Specifically, what damage, if any, is going to happen before July 1st, 1969? A. I believe where I testified about in terms of the concerns that people have; knowing that what is basically a limited amount of money available to them under the best circumstances, even though it is perfectly true we are higher than most of the rest of the country, knowing there is going to have to be less than that, this puts a great deal of pressure on a family as it would be on any of us, whether on welfare or not, that if we knew as of a certain date we would be going to have what I consider substantially less money than we have available to us now.

It affects our planning with respect to such specifics as perhaps moving.

Q. Isn't it a fact that many welfare recipients, although perhaps not a majority, will get more money under the new statute? [95] A. Our studies show that the total welfare cases, -75% of the people will get less money and where there are cuts, they tend to be on an average substantially higher than the increases that the majority would get under the average.

Q. Commissioner, you testified as to special grants that

are afforded by New York City.

Is it your testimony that you prefer the system of special grants to a system of a flat grant? A. The special needs or cyclical grants?

Q. Special grants for special needs, first, such as moving, telephone, alike. A. I believe under the present size of the cyclical grants, or the so-called "flat grants," as it is more popularly known, there are needs for grants to meet needs for moving. It's conceivable in the future we will move to a different kind of a system which will provide one specific grant which will take care of these things. But it obviously will have to be substantially higher than the existing one.

Q. Isn't it a fact under your leadership New York City moved away from special grants? That it established a project with a flat grant? A. We established what I believe was a simplified [96] payment program, which provided a cyclical grant to take care of—I think I indicated to certain special needs, such as clothing and substantial large furniture, but it was not intended to take care of some of these special needs which would now be eliminated as a result of the State legislative act.

Q. Isn't New York City voluntarily heading in the direction of moving away from special grants? A. There is no

doubt.

As I have said we look forward to the day we will have a real flat grant system that would eliminate some of these special needs, as well, but that would be dependent on the fact that it was substantially higher than what we have at present.

Q. Isn't section 131 A without regard to a dispute about the amount of the grant, isn't it a step in that direction, to that extent? A. Mr. Weinberg, I submit there cannot be

any meaningful discussion of welfare without the discussion of the level of the grant.

The single most important of the welfare system is the level of the grant and the money available to poor people and it's impossible to discuss it without taking that into consideration.

[97] Q. Isn't it a fact that nonetheless 131 A is a stride in the direction of the one big flat grant which is moving in a parallel direction with the voluntary direction that New York City has been moving during your leadership? A. In the leadership of Commissioner Goldberg and myself, in that direction at a higher level and I must find difficulty with saying how that coincides with us in going in the opposite direction with respect to level.

If the Legislature had increased-

Q. I didn't ask you about the level. I asked about the flat grant versus special grants. A. I'm in favor of the concept of a flat grant. I am in favor of a higher level of payment for people on welfare.

Q. Isn't it a fact that under the present 1969 State budget, New York City is going to receive more money from the State than it did last year? A. Are you referring solely to welfare?

Q. Yes. A. Yes, I would assume that. That's because it is anticipated, and there is no question about it that we'll have more people on welfare.

[98] Therefore, the total will be larger, but the amount per person would be less.

Q. Are the costs for the average family on aid for dependent children higher in New York City than they are in other parts of the State? A. Well, from what I have looked into and I don't claim to be an expert, I don't think they are significantly higher, let us say in metropolitan New York, but if you are asking me a comparison between New York and St. Lawrence County I would say they are higher in New York with respect particularly to rent, food and other items.

Q. What about New York and the adjacent counties outside the city? A. I have a friend in the Bureau of Labor

Statistics, and he tells me there is no variation between New York, Nassau County and Westchester County, for example.

Q. You testified about day care centers, Commissioner. Are they paid for by the City of New York? A. Under the present system they are 50% city and 50% state.

There is Federal money available under certain conditions which would provide 75% Federal and 12½% [99] City and State and that is the direction we are hoping to

get the money from.

Q. Has the State done anything to discourage the establishment of day care centers by your department? A. By hesitancy as I do not want to get into motives. I believe the State and we are equally convinced of the need of day care centers.

I think we have been disturbed by what appears to be a lengthy interval of taking advantage of the Federal program.

Q. Commissioner, you testified regarding expenditures,

regarding things like moving and the like.

Isn't it a fact that even under the statute that is slated to go into effect July 1st, 1966, that those things could be still paid for possibly under a purchase of services basis or something of that nature? A. I understand that is a possibility. We have not been officially informed of that so that I can only go on what we know as of this moment.

- Q. So you certainly can't conclusively state that they wouldn't be, and you can't conclusively state that those things will be stricken from the budget of a welfare client?

 A. To the best of our knowledge, those indicated [100] are to be stricken out. The only one which I understand there is some question about, is the one of moving. That is the only one that would apply to it, and I know of nothing officially that would be different than what it is in the legislation.
- Q. The ones you enumerated in your testimony on direct examination is the largest, moving? A. It is the largest in amounts of money, which is significant to the client. That is a difficult one. I suppose if I had to make some

kind of a rating, I might put very high the special diets for pregnant women.

I happen to think the mothers and kids about to be born ought to have a special priority and this legislation goes in

exactly the opposite direction.

Q. Without minimizing the importance of the diet of a pregnant woman; isn't it correct that the amount necessary for a special diet is infinitesmal with regard to expenses for moving? A. Yes, that's why I fail to comprehend why the State has taken that action.

Q. Just one or two more questions.

The impact of this statute according to your testimony, the statute goes into effect and the changes are going to go into effect July 1st? [101] A. That's right.

Q. You testified on direct examination that there may be a certain amount of anxiety on the part of welfare clients knowing that perhaps an emphasis perhaps on the payments are going to be cut.

Not all payments are going to be cut. Some will and some won't. How would a temporary restraining order by this Court prior to July 1st alter that picture?

MR. ALBERT: Your Honor, that is a rather inappropriate question.

THE WITNESS: I wouldn't know that.

THE COURT: Yes. Sustained.

MR. WEINBERG: We have no further questions.

THE COURT: Any redirect?

MR. ALBERT: No further questions, your Honor.

THE COURT: Thank you very much.

(The Witness leaves the Stand.)

THE COURT: Next Witness please.

MR. ALBERT: Commissioner Jack Goldberg to be called to the Stand with the Court's permission.

[102] JACK GOLDBERG

having been called as a Witness, and having been duly sworn by the Deputy Clerk of the Court, took the Stand and testified as follows: THE CLERK: Will you state your full name for the record?

THE WITNESS: Jack R. Goldberg.

DIRECT EXAMINATION

BY MR. ALBERT:

Q. Mr. Goldberg, would you state your educational background in the area of public assistance administration and social welfare? A. Bachelor's degree, Brooklyn College. Master's degree and Doctorate, N.Y.U., Camping and Education.

Q. Would you state your experience in the field of public assistance? A. Education Alliance, lower east Side. Williamette Camps, Inc., Office of Economic Opportunity, Juvenile Delinquency Program, Consultant, New York City Housing Authority, Social and Community Affairs.

Part time faculty member, Columbia University, New

York University, Sarah Lawrence.

[102a] Q. Can you state your present occupation? A. Commissioner, Department of Social Services, since February 1, 1968.

[103] Q. As a result of that position, are you familiar with the A.D.C. program in New York City? A. Yes, I

am.

- Q. Can you explain the reasons for special grants that we have heard about today existing under that circumstance for a variety of items, that is, why are there other established categories and in what circumstances are those grants made to people? A. The history of the special grants program was predicated on the assumption that there were at times special needs that individuals and families had and under a historical administration, an individual judgment was made on the basis of an individual need and an individual client as to whether or not they had need for such a grant.
- Q. Was that assumption based upon the fact that the regular recurring grant was not adequate to provide for these items? A. The assumption was there was need in addition to the recurring grant to have this kind of ventilation or special kind of consideration.

Q. When are grants for special diets now awarded? And to whom and under what circumstances? A. They are awarded on the basis of a medical opinion, [104] on medical findings, that somebody is in fact a diabetic, for example, and therefore requires special kind of consideration in diet.

Special grants are provided for pregnant women who are there is concern about the need for them to have an enriched diet while they are, in fact, pregnant.

Q. How about the item of telephones?

Is there a grant made for them? A. Telephones are predicated on three factors. One is the aged and infirm. The other is health considerations and social isolation and each of those is defined individually and consideration is made on the basis of that.

- Q. Are there grants specifically available for employment? A. Yes.
- Q. That is not covered by the immediate aid program? A. No, that is not included. Transportation is available for travel to plants, travel to hospitals, travel to a family planning clinic. Those are part of the special grants that are currently available.
- Q. Is there a special grant for a visit to an institutionalized relative or to attend funerals? [105] A. Yes, if a parent happens to have a youngster institutionalized out of New York, or in New York, there are special transportation grants that are available.
- Q. And, the grant for moving expenses is to cover what items are involved with moving? A. The moving expense grant provides paying the mover to move the furniture and personal effects from one apartment to another.
- Q. Are these grants available today for security deposits for a new apartment, brokerage fees, finding a new apartment, fumigation services? A. Yes, there are.

We provide what is a standard one-month security deposit when somebody is procuring a new apartment.

We provide when the need is indicated a fumigation grant.

These are all special grants that are currently in effect.

Q. In addition to that, does the regular recurring grant cover ordinary items? A. Yes.

Q. Does that purport to be based on the cost of such items? A. Well, it is based on the definition of need as [106] defined by the State Department of Social Services and the State Board of Welfare.

Q. Has New York always paid 100 percent of waht it defines the need to be? A. Yes, it has.

Q. In your opinion, are the amounts assigned to those items of need now covered by the regular grants as well as special grants available? A. It has been my own professional view and studies done by others that we have not met the standard minimum that people need in this city to maintain themselves.

Q. What is the one budgetary item now—well, now available in your experience which would be used, or which is used to cover items that aren't budgeted for? A. In my own judgment, a welfare client or family in terms of management of their resources, the only place they can have any kind of flexibility is on a food budget, which is in itself a significantly limited budget.

Q. That would be a budget that would be used for other purposes? A. They might well do that, yes.

Now, in addition, we had experienced where families have used rent money for other purposes and then, have

had difficulty paying their rent.

[107] Q. What is the effect of using rent money for other purposes? A. It creates a situation where either the Department provides duplicating funds for them, or they are faced with an eviction eventually.

Q. Are you familiar with the legislative amendment of March 31, 1969, particularly Section 131-A relating to provisions dealing with schedules of grant levels? A. Yes, I am.

Q. Which are the special grants that we discussed before do not survive from your understanding under the new law?

A. Well, based on the legislation, literally all special grants

are removed. There has been some tentative indication of some administrative adjustment, for example, moving, but to the best of my knowledge, there has been no change with regard to things like security deposits or brokerage fees or, for example, a layette for a woman about to give birth or for the special diets or for telephones.

There are several others, but those I think are the more critical ones.

- Q. Do the new grants purport to meet the need [108] in full of recipients, the items that are included? A. As I read the legislation, it indicates that the maximum schedule—the assumption is that it suggests that it meets the needs as indicated, or as defined.
- Q. Can these figures conceivably meet needs based on costs of living? A. In my judgment, they cannot, because under our current system of grants, I would have the contention that we do not in fact meet needs now and if the effect of the new grant is to in fact lower the substantial level of welfare clients in the city, then, clearly in my judgment, it does not come anywhere near meeting the needs of the people.
- Q. What items now are being met which will not be met after July 1? A. Well, clearly—
- Q. Are there any luxuries which can be easily foregone by recipients? A. With the elimination of all of the special grants with a decrease for most of the families of their basic recurring budget, I wouldn't suggest that there ever was any luxuries into the budget previously and clearly, the little flexibility that might have been there, in my judgment is considerably restrained and reduced.
- [109] Q. Is there any connection in your experience between an inadequate income allowance for, say, food and clothing, and educational performance? A. Yes, I think there has been a reasonable amount of documentation indicating the relationship of low income, profit income to school performance to educational performance.
- Q. Is there any connection between the same inadequate income for food and clothing and family life? A. Yes, I

think here again we have a sufficient study in the field that would indicate the one of the casualities, one of the relationships to family stability is the degree of trust that arises out of the income level of a family.

Q. Is there an incentive in the new law for students-

family units, rather than larger family units?

Would it, in other words, be financially profitable for a family of eight to be divided into two families of four, or send the children to smaller units? A. If that were conceivable, yes, because there is the new payment system. A new standard of public assistance. The small families with younger children do [110] in fact realize some additional dollars. The larger families, the older children, the more significant the loss is to the family.

Q. Is there a grant presently existing relating to family planning? A. A special grant, no. We would provide transportation for somebody to go to a family planning clinic, but there was no particular special grant.

Q. Would that transportation be similarly provided under the new law? A. To the best of my understanding,

no, it would not be.

Q. Or for medical care or health care? A. No. Transportation as we read the legislation and even with the indications that we have would not be included for that purpose.

Q. How adequate is housing presently occupied by A.D.C. recipients in New York City? A. I think on the basis of our own knowledge, the studies that are now available, the housing supply available to welfare clients is at best terribly inadequate.

Q. Is the problem of landlord discrimination one that you have experienced against welfare recipients? A. Yes, we hear literally every day from the field [111] and from our housing staff of repeated experiences where welfare clients are turned down purely on the basis of the fact that they are in fact welfare clients.

Q. Is there any study of the fact why landlords discriminate or turn down welfare clients?

MR. WEINBERG: Objected to. How far afield can we go here? THE COURT: Sustained.

Move on.

Q. Describe the present grant for clothing and items of furniture in New York. A. We have currently what we call "a cyclical payment" which provides for the payment of \$25 a quarter per person.

So, that a family of four would get, in four different payments, the sum of \$400.

- Q. When was that system instituted? A. August 27, 1968.
- Q. When is the next check per person, \$25, due under that system? A. That would be scheduled, I believe, somewheres during the first week in July.
- Q. Assuming the new legislation is implemented, will it be issued? [112] A. No.
- Q. Was there a policy in your department to encourage people to purchase on the installment program on reliance of those checks? A. There was no formal policy the department took. Workers in the field encouraged families to use that method in order to purchase large items.
- Q. Is it your experience that welfare clients in New York City do have a small, but some amount of credit to purchase on installments? A. Yes, many of the families involved do in fact get involved in time purchasing or credit buying.
- Q. Would that also be true, say, for example, for the neighborhood grocery store and places like that? A. Yes, that is so.
- Q. What would be the effect on people who have purchased items of clothing or furniture in reliance on the cyclical check, for example, the one in July and the one subseto that who are not going to receive it? A. I would think the impact would be one, to turn off any plans they were making anticipating what they would need and what they would have to do and pass that. It may very well affect plans they are already committed to and contractual rela-

tionships they're already committed [113] to, anticipating the cyclical grant would be paid.

- Q. Is it a fact that budgeting the monthly grant, the semi-monthly grant is a problem of varying experience in the lives of recipients? A. Yes, I wouldn't have any question about the extreme pressure that a welfare family lives under with the amount of money that they receive to put the nickels and dimes where they have to be on a day by day basis.
- Q. Are the widely publicized cuts liable to affect the budgeting and calculations of people today? A. I would conjecture that there will be anxiety. There is at this point and that this may very well have an affect on what people do with money now, and certainly with regard to the cyclical payment. There is a clear impact on what they are planning for the future.
- Q. Commissioner Goldberg, how many agency recipients are there today in New York City? A. Just about a million. A.D.C. recipients?
- Q. Yes. A. We have approximately 600,000 children and approximately 180,000 mothers.
- Q. What percentage of the total case load in the State does that represent? [114] A. It is an overwhelming 80 percentish.
- Q. Approximately how many case workers are there in New York City? A. Case workers alone, we have some 12,000 persons as case workers.
- Q. Approximately how many supervisory personnel and case units? A. We have approximately another 5,000 supervisors and an average of 26 case units in each of the 42 centers.
- Q. Is it fair to state that all these persons must be familiar with they new system contained in the legislative amendment by July 1? A. Yes, they would have to be familiar with the system they have now and that isn't always achieved very easily.
- Q. How many checks on a bi-monthly basis are issued to A.D.C. families in New York City? A. We issue to the

family units, 180,000. 180,000 A.D.C. checks every two weeks.

Q. What actually has to be done in your department to fully implement the legislation under question here by July 1? A. Well, each of the A.D.C. cases and in fact the total case load which is some 380,000 cases, each of those [114a] have to be re-budgeted on an individual basis and based on the material that we have in front of us now, based on the new level of assistance and based on removing the special grants that may now be part of the checks that are being rendered.

[115] BY MR. ALBERT:

Q. Can you in fact do this fully for the entire case load by July 1st, assuming the situation is as you now see it? A. If we can begin on the 1st of May and have all the questions answered that have to be answered, we would in fact be able to implement under pressure the necessary changes by the 1st of July, but we clearly have to have the lead time.

It is indicated by me saying if we go by the 1st of May.

- Q. What in your view would be the effect if you were told, assuming now you began the 1st of May taking all necessary speed to implement this by July 1st, what would be the effect of being told, say in June, the previous law, in all aspects, was going to be continued? A. Well, I think we would have at that point created one round of sheer havoc. We couldn't possibly turn around at that point. I think what we would end up doing, hopefully, is getting the public assistance checks out based on the current system that you are suggesting would be changed if in fact we could do that.
- Q. Would it make a significant difference to [116] you administratively to know now that either the new legislation or the old one may be the one in force on July 1st? A. Yes, it is critical.
- Q. As opposed to not knowing anything, I mean. A. It is critical for us to know where we are at literally by the 1st of May for us to do the things that we have an obligation to do under the law.

Q. Processing the special grants today requires a case worker to do what? A. To meet and talk with the client, depending upon what the nature of the grant is. To have the necessary kind of authentication, for example, on a special diet, there has to be some medical input. To secure necessary approval from the next level supervisor to write in a proper authorization for that special grant and for it to be added to the recurring check that is received bimonthly.

Q. Is it accurate to say this process from beginning to the issuance of the grant can take several weeks or months? A. It can. It does not necessarily take that length of time

all the time.

[117] In some instances, it may and in some instances it may be turned out much more quickly than that.

Q. Will there come a time before July 1st, based on the new legislation, when case workers will cease to process special grants which would have to end on July 1st? A. Well, that's going to present an interesting administrative problem. Particularly, under the law, a client is in fact entitled to special grants up to June 30, 1969, assuming that the new legislation goes into effect July 1st.

Up until I guess 12:00 midnight, every client is really entitled to receive special grants if they are qualified for it.

When we stop processing those and go through the process of approving and agreeing and instituing the changes in the checks and at what point we cut it off, because we know there is going to be another administrative horror.

Q. Realize particularly would anyone process a telephone grant, for example, in June under the new law going into effect on July 1st? A. It would make no sense. Legally, that client would be entitled to have that processing.

[118] Q. If someone were planning to move, for example, in July, what would be the case worker's response, who is not a lawyer, to the client? A. I would only conjecture, because you know, the reactions of case workers vary from case worker to case worker.

For some, I would think that they have questions and whether or not they ought to sign off on a moving expense in view of the fact that tomorrow or the next week it is not going to be, I think clearly I would have to acknowledge that the fact that the law would be effective on the 1st of July will have some effect on our practice, our attitudes and our administrative procedures.

I cannot distinctly define how, but if the question is will it affect it, I think yes, it will.

I cannot qualify or specify as to how, but it is clear that it will.

MR. ALBERT: May I have just one moment, your Honor? THE COURT: Yes.

BY MR. ALBERT:

Q. Commissioner Goldberg, are you testifying [119] here today under subpoena? A. Yes, I am.

MR. ALBERT: I have no further questions.

THE COURT: I have a question, Commissioner.

You understand that what the Plaintiffs are asking is to prevent you from taking steps which you have taken now to prepare for the July 1st change, which would prevent you from going back to the present system.

In effect, as I understand it, they are asking me to order you to continue in a posture preparing for either the new system or the present system after July 1st, so that you can use either system, depending on whether the law is declared Constitutional or not.

Are you equipped to go both ways?

THE WITNESS: No.

As I tried to indicate, the process of rebudgeting is a very complex one.

During my tenure, we have been through two such rebudgeting procedures relating to the increase in the cost of living. Each of those is a tedious job that requires workers to be [120] corrected, trained, instructed, forms to be completed systems in our machine set up, our EDP system to be changed, programs to be changed, It is a complicated manpower and technical job and it would be a very serious prob-

lem in our being able to go both ways at the same time, as I gather your Honor is suggesing.

THE COURT: I take it that is the position, at least part

of the position in this order.

You say that unless you klow by May 1st you cannot administratively handle a chaige-over by July 1st.

You know, this is the 23rd of April. That just gives us

seven days.

THE WITNESS: I would ay to you May 6th is a possibility, too. I am trying to ulderline that we literally need the information within the fist week of May.

THE COURT: Even thouh the new system is a lot sim-

pler mechanically, I take it?

THE WITNESS: It is a sippler method in its end result, but not simpler in implemening it to get the end result.

THE COURT: Why is the?

[121] THE WITNESS: E_{ch} income level is going to have to be determined from he point of view of whether a client is still eligible or not

THE COURT: I see.

THE WITNESS: In addition to that, each budget has to be reviewed to see whether i effect there is a special grant. So that there cannot be just simple, casual going over to a new system.

THE COURT: You are n_t sufficiently computerized so that this can be done by feeing in basic criteria and hav-

ing the machine doing it?

THE WITNESS: I must hile at the question. We are sufficiently computerized to have sometimes continuing confusion.

BY MR. ALBERT:

Q. I am sorry. I think misunderstood your testimony on that also.

I believe I asked you if would make a difference to you to be told today that eher the legislative amendments you know about or the presht system will be the system in force on July 1st, then he [122] to be told that in, sometime in May or June. Well, let me try to answer—

THE COURT: Excuse me. I did not understand the question.

Would the reporter read it back, please.

(Whereupon, the previous question was read back by the reporter)

THE COURT: Strike the question.

MR. ALBERT: I will rephrase the question.

Q. In terms of administrative havoc, would it make a difference to you to know that the law which now requires you to change over by July 1st may not be, may not be a valid law; to know that now as opposed to knowing it in June? A. Oh, yes, it would be.

It would create consternation, but it would be very helpful to have that consternation now than to be advised on June 1st that there is going to be a change.

Q. Were you advised on June 1st that that was the situation, would the checks going out in July be the checks reflecting the present law? A. I am sorry, Mr. Albert, I keep losing the sense of your questions.

Q. I am sorry.

[123] If you were to be told that the procedure now, the law of the State of New York which requires you to implement those reductions—is that your understanding of the law of New York today? A. My understanding is that I am charged by the current legislation, the new Public Assistance which starts on the 1st of July, if in fact I have a clear definition that it is going to happen, plus necessary administrative guidance which we have not yet received, we would be prepared to implement with the first checks what is currently a mandate by July 1st.

Q. If you were told on June 1st and not before that that law is invalid and you may not follow it on July 1st, would the checks going out reflect the present standards? A. I cannot answer that unequivocably one way or the other. It would depend on how far we have gotten on the business in changing the magnetic tapes, the systems, et cetera.

We might have gone past the point of no return, so, in fact, we reached that point and we could in fact not deliver the current checks.

THE COURT: I take it, though, from your testimony that you would prefer to have a final [124] decision from this Court, whether it be a single Judge or a three-Judge Court by the end of the first week in May, rather than some kind of a temporary restraining order now that might run on for at least a month or months while the case is continuing in this Court?

THE WITNESS: I want to respond, if I may.

Administratively, the most desirable thing for us would be to have a clear direction one way or another as early as we can get it.

The later we get it, the more administrative havoc it creates. The substantive factor is what the key issues are, rather than the administrative problems.

The substantive issue is what in effect has happened to

the poor people of this city.

THE COURT: What would the cost per month be of the present system as against the new system, let us say, in July?

Supposing we ran over into the new period beginning July 1st to use the old system simply because the Court was not able to answer, because it was up on appeal or something like that?

THE WITNESS: The difference in very gross [125] terms is approximately an eight and a half per cent difference or lower cost with the new system.

THE COURT: What would the cost of the State be?

THE WITNESS: The cost of the State, let's see if I can do that for you right quickly.

We are spending approximately in public assistance at this point, in round numbers, about a billion dollars.

At this point, a twelfth of that, less eight and a half per cent would give us the figure.

THE COURT: What is it, approximately?

THE WITNESS: Let me try to do my arithmetic very quickly.

I think we would be talking somewhere in the neighborhood of somewhere around ten million dollars, where the City would be somewhere around a third of that.

THE COURT: Ten million dollars a month?

THE WITNESS: Yes. I may have to check that more carefully.

THE COURT: All right, thank you. [126] THE COURT: Go ahead.

MR. ALBERT: No further questions at this time.

CROSS EXAMINATION

BY MR. WEINBERG:

Q. One or two question.

If the new statute mandated an increase for everybody on Welfare, and changed the standard in an appreciable way, wouldn't it require the same sort of administrative havoc or horror that you referred to? A. No. What I think I said is if we were advised in the first week of May we can produce by July 1st.

Q. That is purely a function of the time involved and not of the substantive changes of the value? A. If I get a change of signal in time, that is what I say.

Q. Isn't it a fact that this change in the amount of time that your department has within which to cooperate and make the necessary changes and not the direction in which the statute makes the individual amounts received by any one of the recipients— A. What you are saying is true, but I think there [127] is an overlay in this example, if applying a 6.3 increment across the board, that is one order of business. If you now have that review budget and pick out special grants, that is another order of business.

I would say that primarily we need two months (a) institute any major budget change across the board.

Q. You said it takes you about two months to change the amount that various welfare clients in New York are going to receive. Let's talk about this. Suppose you were entitled, let's say, on June 1st, that the statute was going—had been declared invalid, and that you had to revert to the old system, in your direct testimony you used the words "havoc" and "consternation." Isn't it a fact that the amount every welfare recipient gets is on tape? A. Yes, as you change the budget you change the tape.

O. You don't throw it away? A. You amend the tape.

Q. And wouldn't it be a simple matter to retain the existing tapes? A. The consequences would be to retape the whole case load.

[128] Q. Would it be more work to do that than change the tape? A. I wouldn't be in a position to answer that. I don't know that I am competent in that area.

Q. I am trying to learn myself now.

As I understand it, there are tapes which list each welfare recipient? A. I couldn't respond to you responsively, counselor. If we get a change in signals come June 1st, we are going to be in trouble and so are the poor people in the City.

Q. You are not answering my question. A. That is the

only way I can answer it.

Q. You have tapes for each welfare recipient indicating how much they are going to get, and that tape reflects what the recipient gets at present, such as if he gets \$100 a month, under the change that person is going to get a different amount, it might be higher or lower—you say it is going to take you two months in effect to tool-up for that change? A. That is correct.

Q. Suppose you were informed in the middle of that period, say on June 1st, that you had to retain the payments that were presently given under the [129] present

statute. A. Yes?

Q. What I would like to know is how long it would take before you can issue checks at the present amount?

In other words, continue what you are now doing. A. If we haven't gotten to the point of changing the tape and we could retain our budget we would be able to do it.

If we had gone past the point of no return and in fact rebudgeted all clients, we would have serious difficulty in our ability to send checks out.

Q. Do you destroy the records of what you did in the past? A. We do not. We do an individual budgeting sheet for every client and this is done by the Budget worker and it is processed on the tape, amending the tape we have, changing the tape we have so that they come out in a different way when we plug in the computing system.

I will say to you clearly and simply that if we get a change that comes in the middle of that period there is a serious problem—serious difficulty for us to be able to go the old way or the new way.

[130] Q. You would have to go one way or the other; you would have to issue checks? A. Obviously, and the only check we can issue with confidence would be the check we were in the middle of preparing. If we were ready to start the new standard and if we had to go back to the current standard, we would have trouble.

If we continued right now with the assumption of maintaining the current standard, and June 1st advised we have to change it, we would have trouble. I am saying we need approximately two months to implement a responsible change.

- Q. Commissioner, did I understand you correctly that it is your assumption that you are continuing now to pay the present payment after July 1st? A. No. Let's not put words in my mouth. Assuming that, you would have the same problem.
- Q. You can straighten it out with the check the following month? A. With the consequence of what would happen to people in the meantime, plus an additional problem of laying on a rebudgeting process for the entire rebudgeting.
- Q. Everybody would get a check and the check [131] for the subsequent month would contain the old amount?

 A. They might not be able to get the subsequent amount until the next pay period or the one after that. It might

take time to retool. There is no way, counsel, that you can walk away from the issue of administrative problems that would be raised around what flows out of changes in midstream.

MR. WEINBERG: I have no further questions.

REDIRECT EXAMINATION

BY MR. ALBERT:

Q. This rebudgeting is done, commissioner, is done with the individual welfare center around the City? A. Yes, individual workers and case loads and individual budget forms.

Q. Checks are issued from where? A. They are cen-

trally made by the central office.

Q. The calculations are done where? A. The central office turns out the check based on the information that is supplied by the local center.

Q. Is it a fact that you have announced publicly that the cyclical grant to be issued on [132] July 1st is not go-

ing to be issued? A. That is correct.

Q. What steps will you have to take to insure it won't be issued, or effectuated— A. We have to pull out of our processing setup all the authorizations for each case that are entitled to receive that cyclical grant.

Q. That will involve the individual case workers also?

A. That we probably will not have to use the individual

case worker for.

Q. Under the present system, under the law as it now stands, is the obligation your's and your case workers to inform clients if they are asked certainly that the grant is lost or being reduced come July 1st? A. Yes.

O. Does the law of New York require you to do that?

As to what you understand.

MR. WEINBERG: Objection.

THE COURT: Sustained.

BY MR. ALBERT:

Q. If any client asked for things after July 1st that are being eliminated, would it be your obligation to answer that client— [133] A. It would be.

Q. That would continue to be the case from now right on through July 1st?

MR. WEINBERG: I object to any of these questions.

THE COURT: Yes. I don't think it is necessary. It is clear that is so.

That will be all on redirect?

Thank you, Commissioner, for your help.

Next witness.

MR. WEINBERG: Your Honor, I move to strike the testimony of both these witnesses, although they are distinguished gentlemen and experts in their field, as irrelevant.

THE COURT: It is relevant on the question of the jurisdiction of the Court.

Your motion is denied.

Do you have any witnesses?

MR. WEINBERG: Yes.

THE COURT: Let's have them, please.

K. Letter from Judge Weinstein to Chief Judge Lumbard (Document No. 20)

UNITED STATES DISTRICT COURT

Eastern District of New York Brooklyn, New York 11201

Chambers of

Jack B. Weinstein

By Hand

District Judge

April 24, 1969

Honorable J. Edward Lumbard Chief Judge, U.S. Court of Appeals, Second Circuit United States Court House Foley Square New York, New York

My dear Chief Judge:

Pursuant to section 2284 of title 28 of the United States Code, I enclose a copy of my memorandum and order filed today in Rosado v. Wyman, 69-C-355, recommending appointment of a three-judge court.

Your attention is respectfully called to the memorandum and attached temporary restraining order suggesting the desirability, from the point of view of all parties, of an early resolution of the issues in this case.

> Very respectfully, /s/ Jack B. Weinstein

L. Memorandum and Order of Judge Weinstein Convening a Three Judge Court and Issuing a Temporary Restraining Order (Document No. 21)

This is a class action to declare invalid section 131-a of the New York Social Services Law, effective July 1st of this year, fixing maximum benefits for certain classes of welfare recipients in the state. Plaintiffs, residents of Nassau County and the City of New York who are presently receiving welfare benefits which will be substantially reduced under the new law, have moved for a temporary restraining order. Defendants have moved for the convening of a three-judge court. For the reasons stated below, both motions are granted.

Plaintiffs allege that the New York statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Social Security Act of 1935, as amended, and the regulations of the United States Department of Health, Education and Welfare, conditioning receipt of federal aid and its use by the states in their welfare programs. In brief, it is the contention of plaintiffs that federal law requires New York State, if it is to participate in the federal welfare reimbursement program, to take into account increases in the cost of living in computing new benefit levels; that the new state statute violates federal standards by arbitrarily decreasing the sums permitted to be paid to welfare recipients and by arbitrarily discriminating against Nassau County residents in reducing their payments substantially below those available to New York City residents without any basis in costof-living differentials; and that the new state law, if it becomes operative, will cause severe and irreparable harm to plaintiffs and their infant charges.

At this preliminary stage of the litigation it is important to note that plaintiffs are not contending that federal law or regulations require the states to provide any welfare benefits. The power of the legislature to determine how the state's resources should be allocated through the levying of taxes and the appropriations of state monies is not being challenged. Rather, it is plaintiffs' position that when a state chooses to participate in the federal welfare program and receives federal appropriations, it must comply with valid federal conditions.

We first address ourselves to the question of a threejudge court. The way the issues have been framed by the parties, they can be broken down into two questions: first, whether a three-judge court is required to hear plaintiffs' equal protection claim and, second, if a three-judge court would be required, whether it should be convened now or whether a single judge should first decide the statutory cost-of-living claim.

A three-judge court is necessary to hear plaintiffs' equal protection argument. It is clear that it raises a substantial federal question. The Supreme Court's opinion in Shapiro v. Thompson, —— U.S. ——, 37 U.S.L.W. 4333 (1969), decided this past Monday, establishes that the Equal Protection Clause has wide application in the welfare area and suggests that the purpose of conserving funds may not, in and of itself, support grossly dissimilar treatment between similarly situated individuals.

Plaintiffs allege that the classification of New York City residents separate and apart from non-City residents—particularly those in Nassau County—is an invidious dis-

crimination. It is contended that the distinction is not based on need since the cost-of-living for welfare recipients in Nassau County is equal to, or higher than, that in New York City. Under the present law Nassau County is grouped with New York City in determining the schedule of payments. Under the proposed law it is grouped with counties outside the City; as a result, welfare payments will be substantially lower than those for New York City residents. The differences are, it is argued, so far out-of-line with cost-of-living differences between the City and County as to constitute an irrational, invidious and unconstitutional discrimination. We cannot, on the record before us, say that this claim is frivolous.

The two arguments that plaintiffs present against convening a three-judge court on this issue are not persuasive. The fact that they are seeking a declaratory judgment rather than injunctive relief, in the circumstances of this case, is merely a semantical, not a practical, difference. A declaratory judgment would have an effect identical to an injunction. In their complaint plaintiffs ask for "such other relief" as is appropriate and the Court will have the power to grant an injunction. That one may be required is suggested by the fact that plaintiffs are now seeking a temporary restraining order.

The contention of plaintiffs that, so far as Nassau residents are concerned, a statewide statute is not under attack, is without merit. Challenged is the state's entire plan for setting levels of welfare payments. Plaintiffs' attack, if fully successful, may have an effect on welfare recipients in every county in the state.

The second question is whether this Court should refrain from convening a three-judge court until it decides the statutory cost-of-living issue. Plaintiffs' argument that this is a separate and independent claim and that the statutory issue should be decided first, in an attempt to avoid reaching the constitutional issue, is normally persuasive. In this case, however, all parties agree that time is of the essence. Were the Court to decide the statutory claim first and decide it against plaintiffs, a three-judge court would then need to be convened. The delay would be costly to all concerned.

A three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible. A direct appeal to the Supreme Court would lie from a three-judge determination. That Court can move quite expeditiously in matters of this sort, particularly with regard to a stay. Should it subsequently be determined that a three-judge court was not required, the single judge's decision, as part of that three-judge court, would become the opinion of the Court.

We turn now to the question of whether a temporary restraining order should be granted pending the convening of a three-judge court.

Extensive briefing, argument, affidavits of the individual plaintiffs, and experts' testimony in Court requires a finding at this preliminary stage of the litigation that plaintiffs have a substantial probability of establishing the validity of their claims and the right to the remedies they seek, both provisionally and permanently. These findings, it should be emphasized, are not findings on the merits of the action.

Both sides have indicated that prejudice will result should section 131-a be declared invalid after administrative action has been taken which would prevent the state from keeping the present system in effect on July 1st. Plaintiffs' testimony supports a provisional finding that the new statute will cause welfare recipients to lose funds required to keep them at the level of bare subsistence. The state's witness testified that, on the one hand, many recipients will receive higher payments under the new system and, should the state commence payments under section 131-a, the state will not be able to obtain reimbursement if the section is struck down. On the other hand, he stated, it will reimburse those whose payments were illegally reduced.

The sums involved are large. It is estimated that payments under the new system will be approximately \$10,000,000. a month less than under the old. And in some cases reductions to welfare recipients run in the order of 20%. Thus, both the state and many welfare recipients may be irreparably harmed if payments made under the new statute are ultimately determined to be illegal.

Witnesses for both sides indicated that it would take between six to eight weeks to change from one system to the other. The state's testimony indicated that it was possible to prepare for the new system under section 131-a while being able to remain in a position to continue the present system should that be required. This could be done, state experts believe, by preserving the present electronic data processing tapes (or by making a copy of them), while making new tapes in planning for the new system. Since the plaintiffs' witness indicated that the City intends to proceed by modifying the present tapes, it is important that the state take steps for their preservation.

Accordingly, the Court is signing and filing a temporary restraining order today and is witing to the Chief Judge of this Circuit notifying him of his determination that a three-judge court ought to be chief pursuant to section 2284 of title 28 of the Unite States Code. The Court is striking from the plaintiffs' loposed order references to announcements to welfare ripients. The Court can rely upon the good sense of all elfare officials to try to minimize the anxiety of welfare lients.

The twenty day period to an ver expires on April 29, 1969. Because of the necessity or speed, this time will not be extended. Defendants an plaintiffs are advised to have their papers seeking summy judgment and all other relief served and filed on April 9, 1969. The parties are granted until May 2, 1969 to briefs. All undecided motions where the papers and briefs. All undecided motions where the papers are judge court.

So ordered.

Dated: Brooklyn, New York April 24, 1969

JACK B. WEINSTEIN U.S.D.J.

M. Temporary Restraining Order Pending Determination by Three Judge Court (Document No. 19)

[Title Omitted in Printing]

Plaintiffs having moved this Court pursuant to Title 28, United States Code, Section 2284(3), for a temporary restraining order restraining Defendant Wyman from implementing and putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law Section 131-a, added by Laws Ch. 184, March 31, 1969, and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, the testimony taken in open court, and the hearings held to date; and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said Section 131-a, insofar as it effectuates a reduction in the grant levels of public assistance, which require further consideration by a statutory three-judge court, and (2) New York State, its subdivisions and recipients of public assistance throughout the State of New York will suffer irreparable injury if the preparations which are made for implementation of said reductions will prevent the continuation of grants at present levels if this Court finds the reductions invalid, it is

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination by a statutory three-judge court of the validity of the reductions in public assistance effectuated by said Section 131-a:

1. Defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this temporary restraining order) are hereby restrained from denying, reducing or discontinuing public assistance benefits pursuant to said Section 131-a.

Benefits which may not be denied, reduced or discontinued under this order include both regular recurring grants and special grants now available to public assistance applicants and recipients (including the quarterly "flat grant" in New York City and special needs grants throughout the State). Applications for regular and special grants shall be processed in the ordinary course of business without delay or interruption and shall be granted to all persons eligible under current standards, despite any provision to the contrary in said Section 131-a.

2. The Defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this temporary restraining order) may take steps to prepare for conversion to the reduced grants on July 1, 1969, provided that no such step will prevent continued and uninterrupted payments under the present system or some other valid system if Section 131-a is ultimately found invalid.

Dated: Brooklyn, New York April 24, 1969

/s/ Jack B. Weinstein U.S. District Judge

N. Designation of Three Judge Court by Chief Judge Lumbard (Document No. 22)

[Title Omitted in Printing]

Having been notified by the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code

Section 2284 I hereby designate the following judges, in addition to the Honorable Jack B. Weinstein, to hear and determine said cause as provided by law: Honorable Leonard P. Moore, United States Circuit Judge, and Honorable Jacob Mishler, United States District Judge for the Eastern District of New York.

IT IS HEREBY ORDERED that this order be filed in the above entitled cause in the said District Court.

/s/ J. Edward Lumbard Chief Judge, United States Court of Appeals for the Second Circuit

Dated: New York, N. Y. April 25, 1969

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[Title Omitted in Printing]

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, as and for an answer to the complaint herein, respectfully allege:

As to plaintiff's statement of claim:

First: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "12", and in the second sentence of paragraph "3", and the third sentence of paragraph "6".

Second: Deny each and every allegation set forth in paragraph "5" except admit that New York City commenced a demonstration project on the date alleged which eliminated special needs grants as alleged therein.

Third: Deny each and every allegation set forth in paragraph "8" except admit sub-paragraphs (b) and (c) thereof.

FOURTH: Deny each and every allegation set forth in sub-paragraphs (c), (d), (e) and (f) of paragraph "9" and respectfully refer this Court to the language of 42 U.S.C. 602-a § (23) referred to by plaintiffs.

Fifth: Deny each and every allegation set forth in paragraphs "11" and "13", and sub-paragraph (b) of paragraph "10".

As to plaintiffs' first cause of action:

Sixth: Deny each and every allegation set forth in the second sentence of paragraph "2" thereof.

As TO PLAINTIFFS' SECOND CAUSE OF ACTION:

SEVENTH: Deny each and every allegation set forth in paragraph "2" thereof.

As to plaintiffs' third cause of action:

Eighth: Deny each and every allegation set forth in paragraphs "2" and "3" thereof, except admit the discontinuance of the special needs grants referred to therein.

As to Plaintiffs' fourth cause of action:

NINTH: Deny each and every allegation set forth in paragraphs "1", "5", "6", "7" and "8" thereof.

TENTH: Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "4" thereof.

As to plaintiffs' fifth cause of action:

ELEVENTH: Deny each and every allegation of paragraphs "1" and "2" thereof.

As to plaintiffs' "further claim for declaratory judgement":

TWELFTH: Deny each and every allegation set forth in paragraphs "1" and "2" thereof.

THIRTEENTH: Deny plaintiffs' allegation that defendant will cause "irreparable injury unless enjoined forthwith".

As and for a first complete defense, defendants allege:

FOURTEENTH: That this Court lacks jurisdiction over the subject matter herein.

As and for a second complete defense, defendants allege:

FIFTEENTH: That plaintiffs lack standing to institute this action as a class action under Rule 23, Fed. R. Civ. P. since they are not typical members of the class of which they assert themselves to be a part.

As and for a third complete defense, defendants allege:

SIXTEENTH: That this action should be dismissed for failure to join the Secretary of Health, Education and Welfare as a party defendant.

As and for a first complete defense to causes of action 1 through 4, defendants allege:

Services Law § 131-a to the Social Security Act is presently being considered in an administrative proceeding within the United States Department of Health, Education and Welfare. That said Department has requested voluminous information of the New York State Department of Social Services in order to determine whether § 131-a so conforms.

EIGHTEENTH: That said Department of Health, Education and Welfare has primary jurisdiction over this issue and that this Court therefore lacks jurisdiction over the instant action.

As and for a second complete defense to causes of action 1 through 4, defendants allege:

NINTEENTH: That in the year 1968, defendants fully complied with the requirements of 42 U.S.C. § 602-a (23) by adjusting the standard of need and maximum payments employed by the State of New York in conformity with that statute. That this adjustment was approved by the Department of Health, Education and Welfare of the United States. A copy of said adjustment schedules adopted thereunder and of the letter approving said adjustment by the Department of Health, Education and Welfare is marked Exhibit "A" annexed hereto.

TWENTIETH: That this constituted complete compliance with the requirements of § 602-a (23).

As and for a third complete defense to causes of action 1 through 4, defendants allege:

TWENTY-FIRST: That aside from the compliance in 1968 set forth in paragraphs "Nineteenth" and "Twentieth", supra, § 131-a completely complies with all applicable Social Security Act requirements.

As and for a fourth complete defense to causes of action 1 through 4, defendants allege:

TWENTY-SECOND: That the alleged non-conformity of § 131-a to requirements of 42 U.S.C. § 602-a (23) is not a

ground for declaring the invalidity of, or enjoining, the statute since, even if proven, it could do no more than require exclusion of New York State from receipt of Federal grants under the Social Security Act.

As and for a fifth complete defense to causes of action 1 through 4, defendants allege:

TWENTY-THIRD: That a rational basis exists for the disparity in maximum monthly grants and allowances as between New York City and the remainder of the State of New York.

Wherefore, defendants respectfully request judgment dismissing the complaint.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

(Verified by Philip Weinberg, April 28, 1969.)

P. Notice of Defendants' Motion for Summary Judgment and Statement Pursuant to Rule 9(g) (Document No. 26)

[Title Omitted in Printing]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Joseph H. Louchheim, duly sworn to the 28th day of April, 1969, and upon the pleadings herein, the exhibits annexed thereto and all the proceedings heretofore had herein, the undersigned will move this Court at a time and place to be fixed by this Court for an order under Rule 56 of the Federal Rules of Civil Procedure for summary judgment in favor of the defendants upon all of the grounds as set forth in the moving papers herein and for such other and different relief as to the Court may seem just and proper.

Dated: April 28, 1969.

Yours, etc.,
Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants

[Title Omitted in Printing]
STATEMENT OF NO MATERIAL FACTS
PURSUANT TO RULE 9(g)

Defendants contend that there is no genuine issue to be tried with respect to the issues in this case.

Dated: New York, N.Y. April 29, 1969 Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
/s/ Philip Weinberg
Principal Attorney

Q. Affidavit of George W. Chesbro in Support of Defendants' Motion for Summary Judgment (and Exhibits A, C, F, G, I, J, K Thereto) (Document No. 26)

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK.

[Title Omitted in Printing]

STATE OF NEW YORK SS.:

George W. Chesbro, being duly sworn, deposes and says:

I am the First Deputy Commissioner of Social Services of the State of New York and the acting Commissioner of said Department. I make this affidavit in support of the motion of the defendants for summary judgment in this action. This action seeks judgment declaring Social Services Law § 131-a, as enacted by Laws of 1969, ch. 184, to take effect July 1, 1969, to be invalid (1) as in conflict with Social Security Act provisions establishing eligibility for State participation in federal grants under the Aid to Dependent Children (herein "ADC") program, and (2) as violative of the equal protection clause of the Fourteenth Amendment. Neither of these contentions warrant the declaratory judgment or injunction sought by plaintiffs. There is no material issue of fact herein.

The ADC program is part of the Social Services program of the State of New York as established by the Social Services Law and administered by this Department. It is one of several programs operated by the State for the benefit of welfare recipients, including aid to the blind, home relief, aid to the disabled, and the like. Under Social Services Law § 131, which establishes the general

criteria for assistance, care and services to be given under these programs, it is "the duty of public welfare officers, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves." The test of adequacy under that statute "shall be the sufficiency thereof for maintenance in accordance with standards of public health in the community * * *," § 131(3). Pursuant to this statutory responsibility, the Department of Social Services has determined the adequacy of such assistance in all categories of public assistance through the computation from year to year of a standard of assistance. standard is computed on the basis of the pricing of the component items which enter into the level of subsistence found to be necessary for a welfare recipient. These items include food sufficient to provide a well-balanced nutritional diet, as well as adequate clothing, household items, laundry and personal incidentals. A level of needs is arrived at by determining the cost of these components and under New York law includes the amount sufficient to cover all of these items, exclusive of rent and fuel for heating, which are added to the allowance of the recipient on a separate basis. The Department, on an annual basis. reprices these amounts, basing its revisions on the cost of food statistics supplied by the Bureau of Labor Statistics of the United States Department of Labor for the New York City and Buffalo areas-the only two such statistics available for this State. The average of these two districts is taken. As well as, pricing of specific items of food and other articles is done by Department representatives throughout the State. Utilities costs are supplied by the utilities companies serving various regions of the State and computed into the monthly allowance figure. Department regulations require a recomputation whenever the price level rises 2% or more.

Pursuant to this arrangement, in August, 1968, the Department computed a revised standard of assistance for various parts of the State. The State was divided into three regions and the amounts payable to welfare recipients were computed, based on cost of living increases, as follows (figures based on family of 4 receiving ADC):

SA-1 SA-2 SA-3

(New York City (All counties not Dutchess, Greene, in SA-1 or SA-3) Monroe, Nassau, Suffolk, Ulster and Westchester Counties)

(Allegany, Cattaragus, Chautauqua, Erie, Genessee, Niagara, Steuben, Wyoming Counties)

\$152-\$221 \$14

\$149-\$218 \$146-\$215

The variation in these figures hinges on the age of the oldest child in the family. The price schedule is marked Exhibit "A" annexed hereto. The figures contained are exclusive of rent and fuel for heating which, as noted, are paid separately over and above the schedule allowance. The difference between the allowance for the three districts is the cost of utilities. In addition to the schedule allowance, special grants are available for items for special need—moving, security deposits, special diets and the like—as authorized by Department regulation § 352-5.

These allowances were arrived at by the Department following exhaustive analysis of the cost of all the component items. Pricing sheets illustrating the expenses attributable to various component items are marked Exhibit "B" annexed hereto. This State has since 1935, along with every other state, received substantial federal grants for welfare purposes pursuant to the Social Security Act. Section 602 thereof establishes criteria for participation in this federal aid. The Social Security Act imposes certain minimum requirements upon the state as a considera-

tion for receiving these federal benefits. The states must establish a standard of need, but no specific amount of payments is mandated and enacted. As we shall show, the actual level of payments varies widely as between the states. In 1968 Congress adopted § 602(a) (23), which requires the states to provide that by July 1, 1969 the amounts used to determine needs of individuals, and maximum dollar amounts of public assistance, if any, will have been adjusted to reflect fully changes in living costs since such amounts were established. This requires that as a condition of continuing to receive federal money, each state revise its standard of need by July 1, 1969, which New York had done periodically in any event. Federal regulations (45 CFR § 233.20[a]) interpreted this to mean that such adjustment was to be made within the period January 2, 1968 to July 1, 1969. New York complied with this statute on August 23, 1968 when it adopted, and the Secretary of Health, Education and Welfare (herein "HEW") approved, the schedules referred to as SA-1, SA-2, SA-3 (Exh. "A"). The letter sent to local Commissioners of Social Services throughout the State, by this Department, expressly stated (Exh. "A", p. 1):

"The enclosed new schedules of public assistance allowance reflect a substantial rise in living costs that occurred during the year ending May, 1968."

Section 602(a)(23) required any states which imposed a maximum dollar amount on allowances paid to adjust such maximum amount. New York was not such a state.

This extraordinarily permissive federal statute contemplates the widest variety among state welfare systems. It was designed to permit states to pay allowances to recipients at levels which the states arrive at irrespective of the standard of minimum subsistence in that state. Thus a

state need not pay 100% of its own standard of need and many states do not. Whatever amount that state sees fit to pay is subsidized in large part by the federal government. A chart (Exh. "C" annexed hereto) shows that a majority of states pay far less than their own professed standard of need. Mississippi, for example, has a standard of need of \$201 (figures as of April, 1968), yet pays only \$55. Missouri has a standard of need of \$305 and yet pays only \$124. New York's level of \$278 is exceeded by only three states of the fifty, and New York pays its full standard of need, \$278 as of April, 1968.*

In 1968 the City of New York established a demonstration project, with the approval of this Department and HEW, which permitted it to eliminate special grants for clothing and household replacements and substitute therefor a cyclical grant of \$100 per person per year. Creation of this project was requested by the New York City Department of Social Services in order to "result in a more equitable distribution across the total caseload of the funds for 'special needs' and recognize more directly the dignity of the client," and "relieve front line agency personnel from the cumbersome, demeaning, conflict-ridden, idiosyncratic, and administratively cost of client-by-client and item-byitem decision making". The City stated that it expected to provide a "model for the administration of assistance which, if validated, could be replicated within the State and elsewhere in the nation." A copy of the State's proposal for this simplified payment system, dated August 14, 1968, is marked Exhibit "D". It is to be noted that the City Department expressed its "firm belief that the nature of the urban crisis and the higher social cost of living

^{*} These figures include the components in each schedule of payments, together with rent and fuel for heating.

in the metropolitan center requires a differential assistance level in these areas" (Exh. "D", p. 4). Approval by this Department was based on the employment by the City of the flat grant approach to public assistance which avoids the necessity of the recipient requesting special grants on an individual basis. It is the judgment of enlightened Social Services administrators today that the flat grant concept enhances the dignity of the welfare client and permits him to budget more effectively, as well as reducing mushrooming administrative costs and freeing caseworkers for counseling and other professional duties.

In 1969 the State took a substantial step toward implementation of the flat grant approach. In keeping with its practice and responsibility of annual re-evaluation, it determined that administrative expenses could be substantially reduced and implementation of the flat grant approach advanced by the computing of the schedule of assistance to be furnished so as to end rigid categories based on the age of the oldest child and substitute therefor a simplified allowance schedule based on the average age of the oldest child in a given size household. This schedule was arrived at by adopting the 1968 upward revision based on the cost of living increase SA-1, SA-2, SA-3, Exh. "A", supra), and using the mean age of the oldest child in each size family as the basis for the amounts of allowance paid. Thus, for a family of 4, receiving public assistance, the computation of the Department reveals that the mean age of the oldest child is 10.09, as shown by the annexed charts (Exhs. "E" and "F"). The monthly allowance (exclusive of rent and fuel) for such a family of 4 with the oldest child of 10 or 11 is presently \$191 in the SA-1 area (New York City, Long Island, etc.). The United States Government current estimate of the subsistence level for a family of 4 is \$3,535 per year, including shelter

costs and medical care (free in New York State). Estimating the cost of shelter at approximately \$1,000 per year or \$83 per month and deducting that as separately allowed, for New York City, the annual amount of \$2,500 was arrived at or \$208 per month. This represents an addition of \$17 for a family of 4 (\$4.25 per person) to the present \$191. This increment is an approximation of the amounts presently paid under the New York City cyclical grant, to be discontinued under the new law. This figure of \$208 for a family of 4 became the New York City standard of asistance and was embodied in § 131-a as enacted by the Legislature to constitute the schedule of public assistance to be paid as of the effective date of the statute, July 1, 1969.

The standard for the remainder of the state was computed in similar fashion, the differential being \$25 for a family of 4 or an allowance of \$183 a month, again exclusive of rent and fuel. The Legislature determined to provide flat grants in keeping with the most progressive and enlightened practice in the Social Services administration field in order to minimize administrative cost and to provide maximum allowances for recipients in this period of rapidly increasing numbers of recipients.

The mean age was used in these computations instead of the median, a decision which increased the allowances substantially, as the chart (Exh. "F") shows, since in families of 2 to 5, where the overwhelming majority of recipients lie, the mean is older. In addition, wherever the mean constituted a fraction, the allowance used as its base the higher of the two figures.

In addition to the manifest advantage of eliminating administrative costs and enhancing the dignity of recipients by moving to a flat grant standard, this statute also ended the necessity of reprocessing grants for each family as the

oldest child in that family arrived at a new payment level every two years. It was the experience of the Department that many instances of underpayment resulted from the time lag in reporting and processing these age increases. A uniform statewide standard of payments outside New York City was adopted as a means of promoting uniformity and reducing administrative expense, which provides the added advantage of freeing Department and local caseworkers from bookkeeping burdens, as well as the investigation of the needy for special grants, to permit them to use this time for counseling purposes.

The schedule of grants established by § 131-a is:

Number of Persons in Household

One Two Three Four Five Six
New York City \$70 \$116 \$162 \$208 \$254 \$297

Each

Additional Seven Person \$340 \$43

One Two Three Four Five Six
Other Counties \$60 \$101 \$142 \$183 \$224 \$257

Each Additional Seven Person

\$290 \$33

Because the basis of the new schedule is the mean age of the oldest child, replacement of the previous administratively-determined schedules with these statutory flat grants will provide approximately the same level of allowances as was established when the Department made the

1968 cost of living adjustment on which these figures are based. The following chart shows the anticipated effect of § 131-a on the actual amounts to be received by recipients, exclusive of rent and fuel:

		-1	ncrease	Decrease	No Change		
New York	City		41.5%	58.1%	.04%		
Other Cour	nties		49%	51%			

The schedule of grants, it must be emphasized excludes rent and fuel, which are allowed separately. These amounts are, of course, continually increasing and must be calculated as part of the Department's total expenditure of welfare allowances although not reflected in the grants established by the statute. The following chart demonstrates average rent increases (Bureau of Labor Statistics figures):

*	New 10th City	Dullato
Increase Feb. 1967-Feb. 1968 .	2.24%	1.74%
Increase Feb. 1968-Feb. 1969 .	3.16%	2.85%

Median rents in New York City have increased from \$74 in 1960 to \$85 in 1965 and \$96 in 1968, a 13% increase in the past three years. The average rent for a welfare family of 4 as of 1968 is \$83.90 in New York City, the figure used in arriving at the \$208 monthly in the statute. See p. 7, supra.

In addition to the statutory grants, rents and fuel, the Department is in the process of arranging for the absorption of other expense of welfare recipients, previously paid for through special grants, such as moving, security deposits, etc. on a precharge of services basis under which the local Department will pay outright for these services over and above the grant to the recipient. This too will inure to the benefit of the recipient over and above the

grants. By letter dated April 16, 1969, HEW, as part of its administrative proceeding pursuant to 42 USC § 601 to determine whether or not to approve the level of benefits contained in § 131-a, has requested the Department to provide information in detail as to numerous facets of the new statute. A copy of this letter is annexed hereto as Exhibit "G".

The Department's reply to this letter is in the process of preparation.

Plaintiffs' contention here that § 131-a is violative of the requirements of § 602(a)(23) will of necessity be one of the subjects passed on in the administrative determination to be made by HEW. It is plain, however, that the adoption of SA-1, 2 and 3 in August, 1968 based on a complete readjustment on levels of benefits throughout the State in order to reflect cost of living increases, constituted complete compliance with that statute, and that § 131-a maintains this level with adjustments made to achieve administrative simplicity and streamline the process of computing allowances in order to free employees for counseling duties, and improve the self-respect of the recipient by ending the need to request special grants. The Legislative finding made when § 131-a was enacted (L. 1969, ch. 184, § 1), specifically states:

"A uniform schedule of monthly grants and allowances will promote greater uniformity and equality of treatment of the recipients of public assistance, meet the needs of our less fortunate citizens and simplify and reduce the administrative detail. This will release caseworkers for the more important task of providing casework services to restore recipients to the dignity of self-sufficiency. The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of

maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter."

Likewise, the Report of the Joint Legislative Committee To Revise the Social Welfare Law of New York State (1969 Leg. Doc. 9) specifically referred to the state's concern over the size of caseloads of Social Services employees—a problem, it is anticipated, which will be materially lessened by reduction in processing which should be possible when special grants are eliminated.

Section 131-a (5) explicitly requires annual determination by the Department of changes in the cost of living and a report thereof to the Legislature. This is not merely a one-time requirement for adjustment based on the cost of living as was provided for by § 602(a) (23), but an express Legislative mandate for determination by the Department and consideration by the Legislature of the cost of living on an annual basis in order to maintain flexibility in keeping the amounts of grants keyed to the cost of living.

Plaintiffs also challenge the distinction in payments as between New York City welfare recipients and those in the remainder of the state as violative of the equal protection clause. Previously the State had been divided into three categories by counties. As we have seen, Bureau of Labor Statistics figures and Department computations were used to determine the statewide standard. Then utility costs were computed and the State divided into three

^{*} A few cities and one town constitute separate Social Services districts.

areas based solely on disparities on such costs. This created distinctions between essentially similar areas. Thus, the Cities of Buffalo, Rochester and Syracuse were each in a different category and recipients therein received different allowances. In reality, levels of public assistance varied substantially within the State despite the apparent similarity in allowance levels. The Department's 1968 figures indicate the following wide variance in real payments made (exclusive of rent and fuel):

MONTHLY AVERAGE PAYMENTS PER RECEIPT

ADC	New York City \$72.28	Suburban Counties \$69.32	Urban Upstate Counties \$50.51	Remainder of State \$39.07
ADC-Unemployed Fathers	\$72.89	\$57.68	\$42.40	\$34.92
Medical Assistance	\$123.57	\$91.55	\$69.65	\$57.48
Home Relief	\$43.68	\$39.53	\$27.54	\$20.11

These figures reflect a pattern of substantial higher amounts received by New York City welfare recipients, more than double the average received in rural counties in many categories of public assistance. This results from the wide variety of practices of local districts regarding special grants, the greater availability of information in New York City, greater accessibility of welfare offices, the recipients' attitude toward welfare and their degree of organization, their resultant sophistication and willingness to take advantage of opportunities within the system.

Consequently, when consideration of the standards embodied in § 131-a took place, the Legislature determined to provide a higher standard for New York City to reflect

this real differential, accurately described by the City Department as a function of "high social cost of living in the urban center" (Exh. "D", p. 4). The Department's experience has shown that the results are that New York City welfare recipients' actual expenses substantially exceed those of recipients in the remainder of the State. This is due to their higher level of aspiration, greater expectations, the effects of living in a great metropolitan center, and the availability of and need for more recreational facilities than in a suburban or rural environment where children have more space in which to play. New York City life, realistically, in the experience of the Department, includes transportation to beaches, museums, and parks. It includes a higher crime rate which requires safety locks, greater loss of money and material through burglaries, as well as higher laundry expenses due to soot and the like.

Moreover, the Legislature was plainly entitled to consider the sheer number of welfare recipients for New York City—889,000 out of 1,211,000 in the State* and in the ADC program 657,000 out of 887,000. It is undeniable that the City warrants special consideration and the Legislature was simply recognizing this fact. In New York City per capita welfare expenditures per total population amounted to \$66.12; the statewide average is \$39.12 and, by comparison Nassau County is \$13.83. Not one of the 57 counties outside New York City was above the statewide average figure. A chart setting forth these averages is Exhibit "H", annexed hereto.

The resultant legislative determination was to establish separate schedules for New York City and for the re-

^{* 1968} monthly average; Department figures.

mainder of the State, in keeping with the traditional legislative distinction between the City and the remainder of the State exemplified by the Multiple Dwelling Law, numerous provisions of the Code of Criminal Procedure, the structure of the courts, and others. It was particularly appropriate where the vast majority of welfare recipients are within the City and where it would have been difficult administratively to intelligently draw the line between the various counties outside the City which would have matched allowances to the actual cost of living in that county. It is to be noted that in this State the Bureau of Labor Statistics cost of living figures are computed only for New York City and Buffalo.

This statute constituted a legislative method of adopting current cost of living standards while reducing time and effort spent in investigation and calculation of individual amounts of allowances, a process wasteful of time and money and found by the Department to be degrading to the recipient, as well as subject to the vagaries of caseworkers, their supervisors and local administrators. The statute must be viewed in the context of fiscal realities. New York's payments to ADC recipients are the highest in the United States (see chart, Exh. "I", annexed hereto). New York pays eight times the sum provided by Mississippi and more than double the amount paid by any of the southeastern or south central states. The proportion of New York's population receiving ADC is likewise the highest in the country (see chart, Exh. "J") as is the amount expended per inhabitant for ADC payments (see chart, Exh. "K"). This amount is more than double that of 46 of the 49 other states. The number of people receiving ADC allowances is also rapidly increasing from year to

year. New York City shot from 360,000 to 600,000 between January, 1966 and July, 1968 (see chart, Exh. "L").

New York also receives the minimum federal assistance of 50% of its public assistance, in contrast to many states which receive as much as 65% under the sliding scale of federal payments established by 42 USC § 603, which in effect substantially subsidizes those states paying the skimpiest allowances (see chart, Exh. "M").

In the light of these statistics, the Legislature was plainly reasonable in acting to reduce administrative expenditures inherent in the special grant approach and substituting the simplified flat grant method. This was in full conformity with applicable federal law and plaintiffs' challenge to the statute must fail.

WHEREFORE, your deponent respectfully prays that the instant motion for summary judgment in favor of defendants be granted in all respects.

(Sworn to by George W. Chesbro, on April 28, 1969.)

^{*}Figure 2, Staff Report to Joint Legislative Committee To Revise Social Services Law, prepared by Lawrence Podell, Ph. D., Professor, Center for Study of Urban Problems, Bernard M. Baruch College, City University of New York, Nov. 1968.

Exhibits A, C, F, G, I, J, K attached to Chesbro Affidavit (Document No. 26)

Exhibit A (page 1)

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Exhibit A (page 2)

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Exhibit A (page 3)

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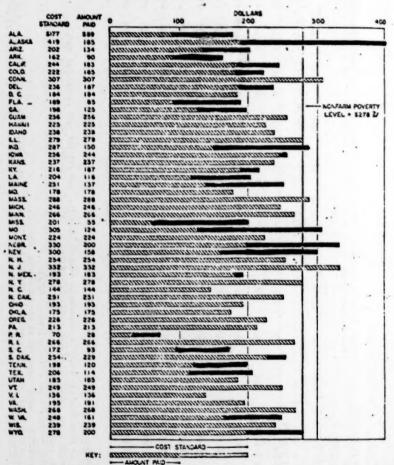
Exhibit A (page 4)

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Exhibit C

CHART 2.

AND TO FAMILIES WITH DEPENDENT CHILDREN: MONTHLY COST STANDARD FOR BASIC NEEDS OF A FAMILY CONSISTING OF FOUR RECIPIENTS AND AMOUNT PAID TO SUCH FAMILY, BY STATE, APRIL 1968 LY



IF DATA BASED ON ASSUMPTIONS THAT THE FAMILY: (1) IS LIVING BY SELF IN PENTED QUARTERS; (2) NEEDS AN AMOUNT FOR RENT THAT IS AT LEAST AS LARGE AS THE MAXINEM AMOUNT ALLOWED BY THE STATE FOR THIS ITEM; AND IN HAS NO MOCHE OTHER THAM ASSISTANCE.

--

[&]amp; FOR A FOUR-MEMBER FAMILY IN CALENCAR YEAR INCO.

Exhibit F

Standards of Assistance Number in Assistance Group

	1	2	7							
	0	45.5	7.39	15.6		13.33		15.03	14.91	16.07
		1.50	0.67	10.09		12.97		23.45	14.73	15.93
		101	152	161	**	262		343	372	17.
		8	12.75	17.00		25.50		*	39.25	43.5
	2:53	316	365	200		283		Trs.	410	\$
Total T	2 2	97	201	808	22	162	3,0	38	125	5

April 16, 1969 Re: Chs. 184, 186, 187 of the 1969 Laws: A. 6935

Mr. George K. Wyman Commissioner State Department of Social Services P. O. Box 1740 Albany, New York 12201

Dear Mr. Wyman:

This is in response to your request for our review of legislation recently enacted in New York State relative to the Public Assistance and Medical Assistance Programs. We are addressing ourselves in this communication to what appear to be the most significant questions raised with respect to Federal implications, in these measures. We are continuing our review of this legislation and, if necessary, we will communicate with you further with respect to any other matters which would appear to merit your careful attention in implementation.

Ch. 184—Section 1 and 5—Maximum Monthly Grants and Allowances

Our primary question as to these sections relates to their operation and effect in the AFDC program. As you know, section 402(a)(23) of the Social Security Act, which became effective January 2, 1968, requires that "by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." This requirement is reflected in the

provisions of SRS Program Regulation 20-7, section 233.20(a)(2)(ii). Section 131-a of New York's Social Services Law as amended establishes schedules of maximum monthly grants and allowances. This provision will raise a question of conformity with the Federal requirements unless the State can establish the following:

- (a) That the State has a need standard in effect in its AFDC program on July 1, 1969 which has been adjusted since January 2, 1968 to reflect fully changes in living costs;
- (b) That the maximums mandated by the statute reflect the required proportionate adjustment to the adjusted standard of need;
- (c) That payments in the AFDC program will be based on need or a ratable reduction arrived at by methods applied uniformly throughout the State.

The statutory maximums are in flat amounts according to the number of persons in the household. In order to evaluate State's compliance with section 402(a)(23) of the Social Security Act we will need full information as to the relationship, if any, between the new maximums and the methods previously applied in determining the standard of need (and payment) in New York's AFDC program. We will also need supporting data in your plan materials for all of the Public Assistance programs demonstrating that the differentiation in maximums between New York City and all other areas of the State is not inconsistent with statewideness requirements.

We have further noted the provision in section 131-a(4) that local districts are to be permitted, with your approval, to adopt "a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to (the maximums) if . . . (it is estab-

lished) to the Commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department."

In this connection, we would call your attention to the provisions of the above-mentioned Program Regulation 20-7 which require that all State plans for OAA, AFDC, AB, APTD, or AABD must specify a statewide standard to be used in determining need and the amount of the assistance payment which will be uniformly applied throughout the State. (S233.20(a)(2)(1), (iii)). While variations in amounts used in determining need and payments may be justified on the basic of differences in the cost of living in local areas, this is a factor to be taken into consideration in establishing the statewide standards which could then be applied uniformly in all areas with the same characteristics. Section 131-a(4), however, would appear to allow variations based on consideration of conditions in one locality alone without regard to its relationship to other localities within the State. Accordingly, unless this section may be interpreted as permitting you to establish standards for granting of a local variance which would allow its application in a manner consistent with uniform application of a statewide standard, a question of conformity with Federal requirements may be presented.

Ch. 184, Section 8—Special Provisions to Avoid Abuse of Assistance and Care

By virtue of establishment of a presumption that any applicant for AFDC who entered the State within one year prior to the date of application entered the State for the purpose of receiving public assistance or care, this section requires any such applicant to prove as a condition to his

establishment of eligibility that his entry was not for such purpose. Of course, such provision must be implemented consistently with the requirement of section 402(b) of the Act that aid must be provided where the family has resided in the State for one year, irrespective of the purpose of coming to the State, and aid must be provided with respect to an otherwise eligible child who has resided in the State for one year immediately preceding the filing of an application regardless of when the applicant relative entered the State. We would add that any acceptance of this provision is based on the authorization of durational residence requirements under the Social Security Act.

You may wish to consider whether the establishment of a presumption which would require the applicant to prove that he did not intend to claim assistance at the time he entered the State is supportable as a reasonable condition of eligibility. While a condition which excludes from eligibility those individuals with less than one year's residence who have been found to have entered the State with the intention of claiming assistance might be viewed as establishing a lesser disqualification than an absolute residence requirement and therefore as being comprehended within the statutory authorization of residence requirements, the accomplishment of such effect through operation of a presumption against the applicant introduces an additional factor which could possibly affect the ultimate determination as to its reasonableness and equitable treatment. We recognize that consideration of this question involves a balancing of many factors including the tests which will be applied in determining the degree and type of proof required to overcome the presumption, and therefore are not suggesting any conclusion on the basis of the legislative language alone. Rather, we are calling this to your attention at this time to assure that the fullest possi-

ble consideration is given to all possible ramifications of this provision in your planning for its implementation on May 1. Implementing plan material would have to assure that that provision can be administered in accordance with objective standards.

We would also appreciate your advice as to the intent of, and effect to be given to, the requirement that such an applicant submit with his application a certificate from the local employment office stating that such office has no order for an opening in work of any kind to which such applicant could properly be referred. If it is intended that the absence of such certificate would necessarily lead to a denial of the application, we have some question as to whether this would constitute a reasonable condition of eligibility. inasmuch as the existence of job openings does not necessarily mean that the applicant can obtain a job, and has no need for assistance. Thus, the applicant might well be unable to produce such a certificate because there are openings to which he or she can be referred and he or she may. in fact, have pursued such referrals without success. the section would require denial in such case, it would appear to be unreasonable. A similar question would be raised if the provision would require denial of assistance where a responsible relative is unable to accept employment to which he has been referred because of inability to arrange adequate day care for the children. Similar comments apply to 8133(4)(a) as amended by section 4 of Ch. 184, providing that no assistance shall be given to an employable person if he fails to file every two weeks a certificate that the employment office has no order for an opening in employment in which he is able to engage.

Furthermore, we assume that the requirement in section 139-a(2) that a determination be made within thirty days is intended for the protection of the applicant only and that

it is not intended to and would not have the effect of placing any time limitation on the applicant's opportunity to submit evidence or otherwise take whatever steps are necessary to prove his intent.

Ch. 184, Section 16-Limitation on Nursing Home Care

This section appears to provide, with respect to the medically needy, that care in nursing homes operated by a State agency will be provided without limit of days, whereas care in other nursing homes will be limited to 100 days during any spell of illness, subject to an extension of 100 days in cases of clear need for extended care. This provision thus establishes that the amount of nursing home care provided under the statute is 365 days a year if needed. A question is raised under section 1902(a)(1) and (8) of the Social Security Act which requires that assistance provided under the plan shall be furnished to all eligible individuals in the State who need it. Is there any assurance that there are sufficient available nursing home beds in State facilities to accommodate all eligible individuals who need care beyond 100 (or 200) days? In addition, a serious question will be presented under section 1902(a)(23), effective July 1, 1969, which provides that any individual eligible for medical assistance may obtain it from any institution qualified to perform the services required. Where an individual needs year-round nursing home care, he would not seem to have "freedom of choice" of institution if the State will support the needed care only in State-operated facilities.

Furthermore, even if the limitations on nursing home care were otherwise acceptable we would need information on the circumstances under which individuals who are medically needy and require care beyond the limited number of days may qualify as categorically needy. We would need

assurance that individuals who can pay for some but not all of their nursing home care will be eligible for payment of the balance after their "excess" income and resources have been applied.

Ch. 184, Section 16—Determination of the Scope of Services Available Under Title XIX

In this respect, we would appreciate your verification of the fact that the changes with respect to the amount, duration and scope of services will not result in a reduction from the level of care available to the categorically needy under your assistance plans as in operation prior to establishment of the Medicaid program. (Sec. 1902(c) of the Act)

Ch. 184, Section 20—Freezing Rates of Payment for Hospital and Health-Related Services

A serious question as to the conformity of your Title XIX plan with Federal requirements is raised by the provisions of this section, which became effective March 30, 1969, and which will require that the payment for hospital and health-related services provided to Title XIX recipients be made until June 30, 1971 at the rate of payment, established pursuant to section 2807 of the Public Health Law, which was in effect on March 31, 1969. As you know, section 1902(a)(13)(D) of the Act requires that a State plan provides for payment of the reasonable cost of inpatient hospital services. A requirement that payment for such services be made for over a two-year period at a fixed rate, not subject to adjustment, which was established on the basis of costs at the beginning of the period, we ald clearly restrict the flexibility needed to assure that payments made are related to costs incurred by the provider.

Furthermore, as is set forth in Program Regulation 40-4, the State agency is required to relate its payments for

inpatient hospital services to the principles and standards applied in determining reasonable cost under the Title XVIII program. (S250.30(b)) There must be payment of current reasonable costs, using interim payments and annual retroactive adjustments, or else making current payments designed to meet in full the anticipated current reasonable costs. Accordingly, it appears that payment at not to exceed a fixed rate, until June 30, 1971, would raise a question of compliance with the Federal statutory and regulatory requirements.

Ch. 186, Section 3-AFDC-Provision of Assistance in Relation to Court Orders for Support

In this connection, we would call your attention to the fact that this amendment to section 350 of the Social Services Law, requiring that "allowances shall not be granted in whole or in part in anticipation that support payments required to be made by a parent pursuant to (court) order . . . will not be made," will have to be implemented in a manner consistent with the basic assistance principle that only income which is actually available to the individual may be considered in determining need. As set forth in Program Regulation 20-7, the State plan for AFDC must provide that agency policies assure that when support payments by absent parents have been ordered by a court, a regular amount of income is available menthly to meet the determined needs of the mother and children, whether or not the support payments are received regularly, and the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available. (S233.20(a)(3)(v))

A. 6935-Medicaid Co-Insurance Provision

This provision states that the 80 percent limitation on payment for medical care and services furnished as

assistance to the medically needy is inapplicable only where the individual's "expenditures for such medical care and services (i.e., care included within the Title XIX plan) have reduced (his) income and resources to the level of eligibility for public assistance." (Emphasis supplied). The acceptability of this provision will be dependent on whether it may be implemented in a manner consistent with the basic Federal requirements that consideration of an individual's income for purposes of determining financial eligibility for medical assistance take into account the costs incurred for medical insurance premiums and for necessary medical or remedial care recognized under State law and not encompassed within the State plan for medical assistance, and that any deductible or cost sharing may not be imposed to the extent that it would reduce the individual's income below the most liberal money payment standard used by the State, at any time on or after January 1, 1966, as a measure of financial eligibility in any categorical money payment program. (Social Security Act, S1902(a) (i4), (17): Program Regulation 40-7. S248.21(a)(1)(ii), (2)(ii))

Sincerely,

James Callison James Callison Regional Commissioner

Exhibit I

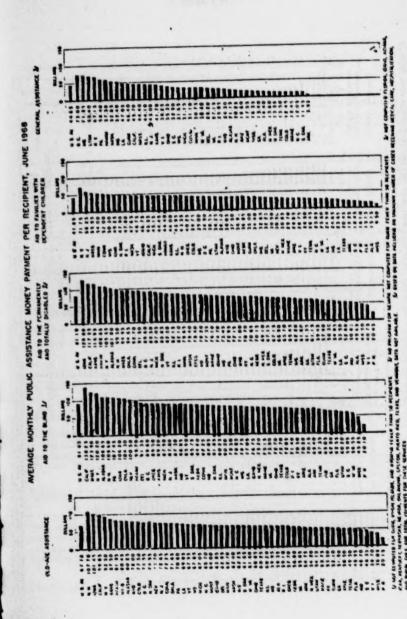
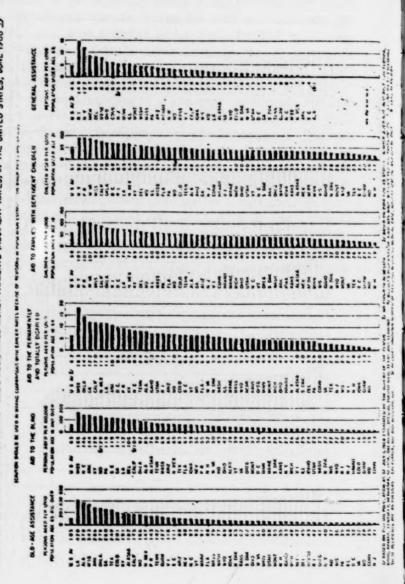
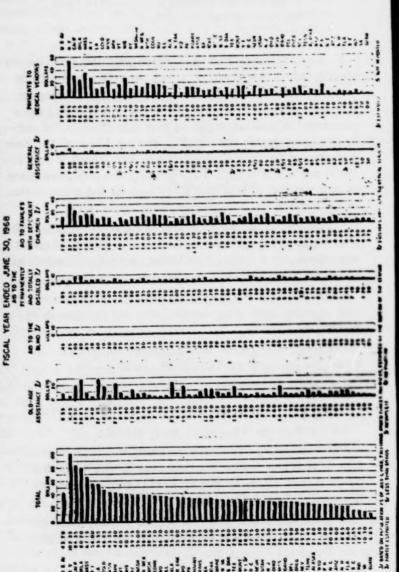


Exhibit J



PROPORTION OF POPULATION RECEIVING PUBLIC ASSISTANCE MONEY PAYMENTS (RECIPIENT RATES) IN THE UNITED STATES, JUNE 1969 1/

Exhibit K



AMOUNT EXPENDED PER HAMBITANT LY FOR PUBLIC ASSISTANCE PAYMENTS.

R. Notice of Plaintiffs' Motion for Summary Judgment and Statement Pursuant to Rule 9(g) (Document No. 29)

[Title Omitted in Printing]

Please take notice that the undersigned will bring on for hearing before this Court at a time and place to be designated by said Court, plaintiffs' motion for a summary judgment pursuant to Rule 56 of the F.R.C.P. and for a permanent injunction declaring that the schedules of public assistance grants contained in Section 131-a of the New York Social Services Law (Laws Ch. 184, added March 31, 1969) are null and void, and enjoining the implementation or enforcement of said new schedules, on the grounds that said schedules:

- (1) violate the requirements of Section 402(a)(23) of the Social Security Act of 1935, 42 U.S.C. § 602(a)(23), and regulations promulgated thereunder, in that said schedules:
- (a) constitute a downward rather than an upwards revision of needs standards reflecting fully changes in the cost of living since such standard was last changed prior to January 2, 1968;
- (b) create maximums which decrease rather than increase the amounts paid to families, and
 - (c) contract the content of the standard of need.
- (2) deny plaintiffs and all recipients in Nassau County
 - (a) the equal protection of the laws and
- (b) the right to equitable treatment regardless of location of residence in the State secured by the Social Security Act of 1935, 42 U.S.C. § 602(a)(1), and regulations promulgated thereunder,

in that grant levels are lower in Nassau County than in New York City for persons whose needs and costs of living are the same.

Plaintiffs move upon the complaint, briefs, and affidavits submitted in this action, their Local Rule 9(g) statement

of material facts as to which there is no genuine issue, the testimony of Commissioners Ginsberg, Goldberg and Louchheim before this Court on April 23, 1969, and the arguments previously made before this Court and to be made in support of this motion. There is no genuine issue as to any material fact, and plaintiffs are entitled to judgment as a matter of law.

Dated: Brooklyn, New York April 29, 1969

> Lee A. Albert Attorney for Plaintiffs Center on Social Welfare Policy and Law

[Title Omitted in Printing]

Plaintiffs submit pursuant to General Rule 9(g) of the United States District Court for the Eastern District of New York the following statement of material facts as to which plaintiffs contend there is no genuine issue to be tried:

- 1. The grant schedules in Section 131-a of the New York Social Services Law (added by Laws Ch. 184, March 31, 1969) were derived as follows:
- (a) New York City. The mean age of the oldest child in ADC families of each given size was determined and the regular recurring grant now available for a family with the oldest child at the mean age was taken from New York State Department of Social Services Schedule SA-1, adopted October 1968. The monthly grant levels set forth in 131-a represent the grant for a family of given size with oldest child of mean size under SA-1, adopted October 1968, plus \$4.25 per person.
- (b) All other counties. The same procedure was applied to Schedule SA-3, adopted October 1968, to determine the grant for families of various sizes with an oldest child of the mean age for that family size group. The result was then "smoothed" as follows:

No in family

. to. at january							0		10
SA-1 Grant for family with	\$102	146	185	233	255	306	355	364	413
oldest child									
of mean age.									
§ 131-a grant	\$101	142	183	224	257	290	323	356	380

2. The amounts paid to New York City AFDC and T-AFDC recipients in special grants for clothing and furniture, the number of recipients, and the per capita payment of such grants, according to the office records of the New York City Department of Social Services, are as follows:

	Number of People Receiving ADC-TADC	Total Amount in Dollars Paid Out	Monthly Dollar Amount/Recipient
July 67	524,868	\$1,107,140	\$ 2.10
Aug. 67	552,000	2,281,314	4.13
Sept. 67	557,704	4,441,867	7.96
Oct. 67	567,414	4,530,156	7.98
Nov. 67	575,537	4,493,507	7.80
Dec. 67	582,871	4,776,666	8.19
Jan. 68	597,777	3,529,499	5.90
Feb. 68	604,920	2,833,241	4.68
March 68	615,064	3,199,218	5.20
April 68	622,364	5,736,166	9.21
May 68	632,840	8,435,040	13.32
June 68	644,180	10,471,896	16.25
July 68	659,982	10,368,979	15.71
Aug. 68	673,829	9,083,154	13.48

^{3.} The laundry schedules for New York State in effect on January 2, 1968, as set forth in 18 NYCRR § 352.5(h) (2) were as follows:

Man har in							8 or
Number in household	2	3	4	5	6	7	more
	\$3.00	\$5.40	\$6.95	\$8.45	\$10.40	\$11.90	\$13.45

and these are the amounts which were typically supplied to recipients in New York City for laundry.

4. According to the records of the New York City Department of Social Services, the following amounts were paid to New York City AFDC recipients in January, 1968 for the special needs indicated:

Day care expenses	\$ 28,153
Moving expenses	204,997
Extra school expenses	15,260
Security expenses	403,671
Accrued utilities	71,553

5. As required by the New York City Handbook for Case Units in Public Assistance Administration, Sec. II, the following monthly amounts are now provided to families with the special needs indicated in addition to the regular recurring grant:

\$16.00 for an extra adult 10.00 for a blind or disabled person 5.50 for a pregnant woman 5.80 for washing babies' diapers 8.00 got people who must eat out

- 6. The standards of assistance in effect in New York on January 2, 1968 were established on the basis of the annual cost and price study of the New York Department of Social Services conducted in May, 1967.
- 7. Implementation of Section 131-a will result in a saving of funds by the State as the result of overall lower payments for public assistance grants.
- 8. The cost of living for welfare recipients in Nassau County is equal to or greater than that for welfare recipients in the City of New York.

Take notice that said Rule 9(g) provides that all facts hereinafter set forth "will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

Dated: Brooklyn, New York April 29, 1969

/s/ Lee A. Albert
Attorney for Plaintiffs
Carl Rachlin
Attorney for Plaintiffs

S. Tables III, IV, V from "Welfare in Long Island" (Long Island Association of Commerce and Inddustry) (Document No. 36)

Table III

Percent of Public Assistance Payments From Federal Funds, by State, Fiscal Year 1967 I

NK	STATE	PERCENT	RANK	STATE	PERCEN
	Mississippi	11,000	25 10	diama	\$ 59.0
	Georgia	177.53	1.27 No	vada	1 50.
11		78 1	1 WS	scongin	1 50.1
	Alabama	77.	DO ME	nnegota	84. 4
	Kentucky	1 74.5		S. AVERACE	54.0
	Nentucky				
!	Arkansas	77.0		-	1:
- 1	Florida	1 76.0		lorado	1 13.0
- 1	Tennessee	1 / 1.0		ode Island	9 50.19
01	West Virginia	1 75.2 1		nnsylvania	-5i.t
:01	Louisiana	1 74.7	.34. Oc	egon	; 51
-		1 4			
1	Toxas	74.1 .	135 W	uming	2 51.2
12	Arizona	73.5	36 Ka	D 84 9	; 31.1
	New Nexico	73.1	37 W	shington	.50.
13	North Carolina	73.1 .	38 CP	io	49.6
15		79.7	39. Na	ryland	49.4
-		1 4	. ***		2
	Virginia	70.2	-40' 11	linois	149.
* 19	Cklahoma	70.0 1	41 t M	lchigan	48.1
	Vergont	1 62.7 3	142 C	lifornia	46.
	Nebraska	1 67.8 1	143 i M	seachusetts	:40.
194	Maine	. 47.3	14: H	ilama	47.1
	i	1 4			1.
* 1	Utah	100.2	143 A	la ska	147.
20	Missouri	102.4 1	143 M	ontana	140.
M III	Nurth Dakota	105.2	-17 i O	pnnecticut	45.
24	South Dakota	62.5	48 : N	ew Hampshire	143.
25	Delaware	59.7		ow Jersey	41.
-	1		1		
	1		-		
*		1	30 N	EN YORK	:39.

^{1.} Source: Same as Table 1

^{2.} Includes Quam. Puerto Rico and the Virgin Islands.

TABLE IV

Per Capita Public Assistance Payments from State and Local Funds, by State, Fiscal Year 1967¹

RANK	STATE	CAPITA	HAPRE	STATE	CAPITA
-	27238		1		
-1:	California	\$38.80	26	New Hampshire	i\$10.03
3:	HEM ACKIK	36.00	(27)	Wyoming	9.55
34	Massachusetts	25.251	20	South Dakota	. 4.20
4	Cklahosa	22.75	1 29	Arkansas	3.75
38	Colorado	22.601	30	Vermont	9.15
		1	1 3		1 1
. 61	Shode Island	19.75	31 -	Haine	1.55
1.74	Washington	17.40	32	New Nexico	. 3.15;
. 81	Minu-sota	17.25	33	Utah	6.09
1.	U.S. AVERAGE	15.80	34	Kentucky	7.60
. 95	Connecticut	15.45	. 35	Alabama	: 7.40
1 1		3			
1		1	5		
107	Michigan	14.75	. 36	Delaware	. 7.30.
1113	Illinois	- 14.10	36.2	Nebraska	7.30
:12 1	Hamaii	14.00	36 4	Nevada	7.30
:13,	Haryland	13.95	139 1	Idaho	. 6.90
14	Kansas	3.45	40 :	West Virginia	6.60
		1	4. 7		
15	Pennsylvania	13.30.	141 3	Toxas	1
16.	Louisiana	13.15	42	Georgia	0.10
17	Montana	712.40	411	North Carolina	5.30
cia l	New Jersey	11.85	44	Tonne see	5.13
115	Chio	11.30	45 4	Arizona	5.00
1" 1	CM10	11.30		AFIRONA	3,10
1 4		1 1	1		
:20	Wisconsin	1 .23	46.	Mississippi	4.50
21	Oregon	111.201	147 3	Florida	1.49
122	Iowa	41.15 1	1411 \$	Indiana	4. 10
123	Hissouri	11.60	44.	Virginia	2.65
21	North Dakota	10.40	50 -	South Carolina	2.55
: 1		1 1	1- 1		5
5.			6		
23	Alaska	60.10	2		· (4. + 4")

^{1.} Source: Same as Table 1 2. Includes Quam. Puerto Rico and the Virgin Islands

TABLE V

Public Assistance Payments from State and Local Funds per \$1,000 Personal Income by State 1966¹

	STATE	PAYMENT	HANK	STAR	PAPER
	California	\$ 11.45	26	Alabana	3.60
	NEW YORK	10.35	26	New Hampshire	
,	Oklahoma	9,30	28,	Vernont	3.5%
1	Colorado	. 7.85	33	wyoming	10.15
	Massachusetts	7.75	39	New Jersey	
		1 1	. 1		
			. 1		
	Rhode Island	0.50	. 31	Maine	. 1.00
2	Minnesota	5.95	: 32,	Kentucky	
	Louisiana	. 5.85	32	New Mexico	2 3.00
	Washington	. 5.50	. 34	Utah	3.65
	U.S. AVERAGE	5.40	35	Alaska	3.00
	OT IN MICHIGAN		: '		
	,				.3.0
· .	Nontaba	4.70	36	West Virginia	2.8
1	Kansas	4.70	, 37	Idaho	2.5
:	Arkansas	4.65	. 38	*iauiaaippi	2.5
	Hawaii	4.63	. 39	Nebraska	3.4
	Nichigan	4.60.	40	Texa«	• • •
	macina yan	***			
		15.7			2.4
	Pennsylvania	4.50	41	Grurgia North Carulina	
5 .	Naryland	4.45	142	Tennesser	2.3
7	North Dakota	4.35	43		.2.1
	Connecticut	4.25	44		2.1
1 6	Illinois	/4.05	45	DGITMALE	
	• • • • • • • • • • • • • • • • • • • •	2 . 3			
				Arteuna	.2.4
0	Missouri	3.95	47		.1.7
i .	Oregon	3.90			11.4
2 !	wouth Dakuta	3.30	48		
2 .	Wisconsin	3.80	6.9		72.0
44	Chio	3.75	50	Assaure	
			**		
-		143*4			-5
5	lows	3.70			

I. Source: Same as Table I

^{2.} Includes Quan. Puerto Hier and the Virgin Islands

T. Defendants' Supplemental Statement Pursuant to Rule 9(g) (Document No. 38)

[Title Omitted in Printing]

Defendants controvert plaintiffs' contention that there is no genuine issue as to the facts contained in paragraphs "7" and "8" of plaintiffs' statement of material facts (General Rule 9(g), U.S.D.C., E.D.N.Y.). Defendants agree that no trial is required as to these contentions.

Dated: New York, New York May 1, 1969

> Louis J. Lefkowitz Attorney General of the State of New York Attorney for Defendants

U. Letter from Lee A. Albert to Judges Moore, Mishler and Weinstein (Document No. 51)

May 6, 1969

Honorable Leonard P. Moore, Court Justice Honorable Jacob Mishler, U.S.D.J. Honorable Jack B. Weinstein, U.S.D.J. United States Courthouse Brooklyn, New York

Re: Rosado v. Wyman, Civ. No. 69-355

Dear Honorable Sirs:

This letter is submitted to clarify a misunderstanding which may result from the closing remarks on Friday of the State's attorney, in reference to the power of a federal court to enforce the plan requirements of the Social Security Act.

Federal funds utilized by the states under the ADC programs are not effected in any way by the submission to H.E.W. of a change in the plan for the administration of aid, or even by the submission of an entirely new plan.

Handbook of Public Assistance Administration, Part I, Sec. 4220. During the period of review of such changes and, indeed, the period after initial disapproval by H.E.W., the federal funds continue to flow. The plan changes submitted to H.E.W. may, and invariably are, implemented in the state during the substantial period of informal review and continuous federal funding. Federal grants for the operation of the categorical assistance programs are advanced to the states from the Treasury on a quarterly basis. 42 U.S.C. § 603(b).

The first point at which federal funds may be terminated arises only after H.E.W. has made a formal finding of non-conformity (as opposed to the more common practice of "raising questions" with the state) and conducted a formal conformity hearing. Handbook, Part I, Sec. 4310 (5). The state is then entitled to review in the United States Court of Appeals. Handbook, Part I, Sec. 4310 (3). Until that point, the state continues to utilize federal funds.

For example, the H.E.W. amicus brief in Kelly v. Wyman. 294 F. Supp. 893 (S.D.N.Y. 1968) filed in the Spring of 1968, stated that New York's plan changes with respect to fair hearings and other matters had not yet been approved. and that there was substantial evidence that New York had failed to comply with the federal requirements with respect 42 U.S.C. § 602 (a) (4). To this day, New to hearings. York fails to render fair hearing decisions in accordance with the federal requirements. Welfare recipients have petitioned H.E.W. for a formal conformity hearing on this issue, and, although H.E.W. acknowledged New York's substantial non-compliance over six months ago, the federal agency continues to refuse to make a formal finding of non-compliance or to order a hearing, since the aim of H.E.W. is to achieve compliance through informal means so that federal funding to the state will not be endangered. See, letter of Robert H. Finch, attached hereto.

In King v. Smith, the Alabama regulation had been submitted to H.E.W. and questioned under the present 42 U.S.C. § 602 (a) (10). The regulation was continuously under question for several years during which Alabama continued to receive and expend federal monies. This case is simply King v. Smith several years before the continuous illegal use of federal money.

What was essential to the decision in King v. Smith was plan condition number 10 in 42 U.S.C. § § 402 (a) and 602 (a) — one of the conditions with which states must comply in order to receive federal money. That condition states that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." [Emphasis added.] The Social Security Act definition of the word "parent" was relevant on the meaning of "eligible individual." It had no other legal force in the case. The only difference here is that we rely on plan condition number 23 rather than condition 10.

It may be noted that whatever H.E.W.'s view in Lampton v. Bonin was on the merits, it did not question the federal courts' power to interpret the federal statute and require compliance with it. H.E.W. has consistently agreed in welfare cases, that federal courts have jurisdiction to invalidate state plan provisions not conforming to the federal requirements in 402 (a). The voluntary use of federal monies compels this result under the supremacy clause of the Constitution.

Respectfully yours, /s/ Lee A. Albert

Attachment

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE WASHINGTON

Dear Mr. Flaster:

This is in further reply to your "Complaint and Petition," requesting a hearing to determine the conformity of New York State's public assistance programs with certain Federal requirements pertaining to fair hearings.

In the absence of a specific request by the State agency, such hearings are held only on the initiative of this Department as a last resort after questions have been raised with the State agency, and efforts have been made to resolve these questions. The calling of a hearing means that the Department has made at least a preliminary determination that deficiencies in the State's public assistance program are so serious, and attempts to obtain correction are so unpromising, that Federal payments must be withdrawn from the program. The impact of any withdrawal of Federal funds would fall predictably on the public assistance recipients in the State. For these reasons, hearings have been held only for the most irreconciliable disputes between the Federal and State agencies.

The information in your petition about fair hearing practices in New York warrants further inquiry by this Department. I have asked the Administrator, Social and Rehabilitation Service, to look into the extent of the problem and the possibilities for correction. Our aim will be to assure compliance with Federal requirements without the threat of cutoff of Federal funds.

Thank you very much for bringing this matter to my attention. Efforts such as yours are making an important contribution to the improvement of the public assistance program.

Sincerely,

/s/ Robert H. Finch Secretary

Mr. Richard J. Flaster Secr Staff Attorney Nassau County Law Services Committee, Inc.

V. Letter from Philip Weinberg to Judge Weinstein (Document No. 42)

Re: Rosado, et al. v. Wyman, et ano.

Hon, Jack B. Weinstein United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York

Honorable Sir:

The bill amending Social Services Law Section 131-a(4), a copy of which was delivered to the Court yesterday, was introduced under a message of necessity from the Governor. It passed the Senate on May 1, 1969 and the Assembly on May 2, 1969. It will be presented to the Governor this Friday, May 9, 1969. Since the Counsel to the Governor assisted in the drafting of this bill, it is anticipated that there will be no objection to signature of the bill by the Governor.

In addition, pursuant to this bill, it is contemplated that regulations will be drafted by the Department of Social Services which will implement the amendment.

Respectfully yours, Louis J. Lefkowitz Attorney General By Philip Weinberg Principal Attorney

W. Memorandum and Order of Three Judge Court Dissolving Itself (Document No. 43)

PER CURIAM

A three-judge court was properly convened in this case when plaintiffs challenged the constitutionality of section 131-a of the New York Social Services Law. Chapter 184 of the Laws of 1969, adopted March 31, 1969, effective July 1, 1969. It is contended by plaintiffs that the provision constitutes an irrational and invidious discrimination against residents of Nassau County because the schedules of payments under the Aid to Dependent Children provisions were some 15% less for Nassau County residents than for residents of the City of New York even though the cost of living for those families receiving aid to dependent children was not lower in Nassau County than in New York City.

Following designation of members of the three-judge court by the Chief Judge of this Circuit, all parties filed motions for summary judgment with supporting affidavits on April 30, 1969. On the same day that motions for summary judgment were submitted, a bill to repeal subdivision 4 of section 131-a of the New York Social Services Law and to provide a new subdivision 4 was introduced in the Legislature.

Subdivision 4 of section 131-a, as originally adopted, provided for a method of reduction of monthly grants and allowances in areas outside the City of New York but not for their increase. The new subdivision 4 provides that

the Commissioner of Social Services of the State of New York may promulgate schedules of monthly grants and allowances in individual districts "for greater or lesser amounts" than those established under section 131-a to reflect costs of living "but not to exceed the maximums prescribed" for residents of the City of New York. In addition, the new subdivision 4 also permits local social services officials, "with the approval of the appropriate local legislative body," to "make application to the department" of Social Services "for the promulgation of a schedule pursuant" to this new subdivision. The new subdivision reads as follows:

4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district. but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

This bill was adopted on May 2, 1969 by the Legislature after a message of necessity from the Governor eliminated

the need for following legislative procedures which might delay its passage. See New York State Constitution, Art. 3 § 14. The Governor signed the bill on May 9, 1969 and, according to its terms, it takes effect on July 1, 1969, as did the original subdivision 4.

Pursuant to this new subdivision 4, the Commissioner of Social Services of the State of New York may—either on his own motion or after an application by a local Social Services Officer with the consent of the local legislative body or upon the petition of an aggrieved party, pursuant to Article 78 of the New York Civil Practice Law and Rules—provide schedules for monthly payments in all parts of the state which reflect differences in cost of living.

Under the circumstances it is apparent that the constitutional issue posed is no longer justiciable. The constitutional attack on the provision as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding. We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. King v. Smith, 392 U.S. 309, 312, n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

It is ordered that the three-judge court heretofore convened be and is dissolved and that the matter be and is remanded to the single judge to whom the complaint was originally presented for such further proceedings as are appropriate. See Peterson v. Clark, 285 F. Supp. 698, 700 (N.D. Calif. 1968); cf. International Ladies' G. W. U. v. Donnelly Garment Co., 304 U.S. 243 (1938).

So ordered.

Dated: Brooklyn, New York May 12, 1969

- /s/ Leonard P. Moore
 Leonard P. Moore, Judge,
 United States Court of Appeals
- /8/ Jacob Mishler,
 Jacob Mishler, Judge,
 United States District Court,
 Eastern District of New York
- /s/ Jack B. Weinstein, Judge,
 United States District Court,
 Eastern District of New York

X. Temporary Restraining Order (Document No. 45) and Order Granting Preliminary Injunction by Judge Weinstein (Document No. 58)

[Title Omitted in Printing]

Plaintiffs having moved this Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a temporary restraining order restraining defendant Wyman from implementing and putting into effect the system of "maximum monthly grants" and schedules of need prescribed by New York Social Services Law Section 131-a, added by Laws Ch. 184, March 31, 1969, and this motion having been considered by this Court:

Upon the pleadings, affidavits and briefs submitted on behalf of the parties, the testimony taken in open court, and the hearings held to date; and upon the finding by this Court that (1) substantial questions have been raised by plaintiffs about the validity of said Section 131-a, insofar as it effectuates a reduction in the grant levels of public assistance, which require further consideration by this Court, and (2) New York, its subdivisions and recipients of public assistance throughout the State of New York will suffer irreparable injury if the preparations which are made for implementation of said reductions will prevent the continuation of grants at present levels if this Court finds the reductions invalid, it is

ORDERED, ADJUDGED AND DECREED THAT, pending adjudication by this Court of the validity of the reductions in public assistance effectuated by said Section 131-a:

1. Defendant Wyman, his successors in office, agents and employees and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this injunction), are hereby restrained from denying, reducing or discontinuing public assistance benefits pursuant to said Section 131-a. Benefits which

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may not be denied, reduced or discontinued under this order include both regular recurring grants and special grants now available to public assistance applicants and recipients (including the quarterly "flat grant" in New York City and special needs grants throughout the State). Applications for regular and special grants shall be processed in the ordinary course of business without delay or interruption and shall be granted to all persons eligible under current standards despite any provision to the contrary in said Section 131-a.

2. The defendant Wyman, his successors in office, agents and employees, and all persons in active concert and participation with them including local social services officials administering the Aid to Families with Dependent Children program under State supervision (insofar as said officials have actual notice of this injunction) may take steps to prepare for conversion to the reduced grants on July 1, 1969, provided that no such step will prevent continued and uninterrupted payments under the present system or some other valid system if Section 131-a is ultimately found invalid.

It is also ORDERED, ADJUDGED AND DECREED that this Temporary Restraining Order shall expire ten days after entry unless renewed by this Court.

Dated: Brooklyn, New York May 12, 1969

/s/ J. B. Weinstein U.S.D.J.

Pursuant to this Court's Order and Memorandum dated May 15, 1969 and after argument by all parties, IT IS OR-DERED:

- (1) the above temporary restraining order is incorporated in and shall be a preliminary injunction adopted pursuant to Rule 65 of the Rules of Civil Procedure;
- (2) this preliminary injunction is effective until final decision on the merits of this case;

- (3) plaintiffs shall file security in the sum of \$1,000 pursuant to subdivision (c) of Rule 65; and
- (4) defendants' motion for a stay of this preliminary injunction is denied.

Dated: Brooklyn, New York May 16, 1969

/s/ J. B. Weinstein U.S.D.J.

Y. Letter from George K. Wyman to James Callison June 2, 1969

Mr. James Callison
Regional Commissioner
Region II
Department of Health, Education and Welfare
26 Federal Plaza
New York, New York 10007

Re: Chapters 184, 186, 187, 411, 957, 1118 (A6935), 1119

Dear Mr. Callison:

I appreciate your prompt response to our request for a review of the legislation enacted in New York State this year relative to the public assistance and medical assistance program. This reply to your letter has been delayed until final action was taken on State legislation.

Maximum Monthly Grants and Allowances. As you know, subdivision 4 of Section 131-a was amended by Chapter 411 to provide for the promulgation of allowance schedules by me for use in social services districts, providing such schedules did not exceed maximum monthly grants and allowances established for the City of New York in subdivision 2 of Section 131-a.

Allowance schedules will be promulgated for the various social services districts based on the schedules resulting from

the May 1968 pricing of our quantity-quality standards as approved by you on September 23, 1968. In accordance with federal requirements for simplified budgeting, these schedules give a money amount for each household, exclusive of fuel for heating, shelter, additional allowances for clothing and furniture in certain catastrophic situations, and for occupational training expenses.

The initial point for developing the standards was the mean age of the oldest child for each size household obtained from the ADC Characteristics Study. Proper consideration was given to the fact that there is a direct relationship between the age of the oldest child and the size of the household. The monthly allowances obtained in this manner were adjusted to provide for equal increments for each additional person up to four and in a lesser amount for larger households. (See schedules attached.) The differentiation between New York City and the rest of the State is based on a recognized fact that New York City is unique by reason of its size and complexity, resulting in special requirements for transportation to use available services. Illustrative of this, but not all inclusive, is the need for transportation to various welfare centers, recreational centers for the aged, day care centers for children and cultural and recreational facilities, such as museums, parks and beaches.

Any application by a social services district for a schedule of monthly allowances, greater or lesser than these promulgated by me, will be reviewed against the cost of our statewide quantity-quality standards, based on May 1968 prices.

These monthly allowances schedules apply only to persons residing in their own home in the community. Our regulations for persons living in group-cure facilities are entirely different.

Special Provisions to Avoid Abuse of Assistance and Care. Our regulations governing the application of Chapter 184, Section 8, are attached. We have received notice of the new federal requirements which have not yet been promulgated.

Limitation on Nursing Home Care. The limitation on nursing home care which was enacted by Chapter 184 (amending subdivision 8 of Section 369-a of the Social Services Law) was revised by Chapter 957 so that there will be uniform treatment of persons receiving such care in facilities whether or not they are State operated. Absolute limitations as to the length of such care have been eliminated. Instead there is provision for a medical evaluation at the end of the first one hundred days to ascertain whether need for such care continues. If it does, such care may be provided as long as it is needed.

Determination of the Scope of Services Available Under Title XIX. There will be no substantial or meaningful reduction in the amount, duration and scope of services to the categorically needy under the State's plan in operation.

Freezing Rates of Payment for Hospital and Health Related Services. Current rates are reasonable and based on needs as required by Section 2807 of the Public Health Law of New York State. An amendment to the law made by Chapter 957 provides that current rates shall remain in effect only until December 31, 1969. At that time the need for adjustment, if any, will be considered.

Provision of Assistance in Relation to Court Orders for Support. Our regulation defining habitual failure to make support payments and describing the circumstances under which there are reasonable grounds for believing the support payments will not be made have been promulgated (copy attached) to meet your requirements that assistance payments will be made on the basis of available rather than assumed income.

Medicaid Co-Insurance Provision. This proposal has just become law. We will make appropriate provision to assure that any costs sharing by a recipient of medical assistance will not reduce such person's income below the most liberal money payment standard need by us since January 1, 1966.

As our Board Rules and Department Regulations are

promulgated, we will, of course, forward them to you promptly. We are submitting at this time two copies of all the chapter laws of 1969 above referred to.

Sincerely, (Signed) 6/3/69 George K. Wyman Commissioner

Z. Letter from Lee A. Albert to Judges Moore, Mishler and Weinstein enclosing letter from George K. Wyman to James Callison with enclosure (Document No. 73)

June 10, 1969

Honorable Leonard P. Moore. Circuit Judge United States Court of Appeals United States Courthouse Foley Square New York, New York Honorable Jacob Mishler United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York Honorable Jack B. Weinstein United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York

Re: Rosse v. Wyman, Civ. No. 69-355 Petition for Hearing and Amended Judgment.

Honorable Sin:

Without abandoning our claim that the mere existence of a discretionary administrative power to remedy a legislative discrimination in no way renders a challenge to that discrimination moot or unripe, we enclose state administrative materials setting forth the actual and final exercise of the dispensing power and the schedules effective on July 1, 1969. While the amount of the differential between New York City and Nassau County has been slightly decreased by approximately 30% or less, a considerable and significant differential remains. The justification for the differential now asserted—"special requirements [in New York City] for transportation to use available services"—cannot withstand analysis. As we set out in our earlier papers, transportation costs are considerably higher in Nassau County.

Hence, we continue to believe that this differential offends the Equal Protection Clause and the uniformity requirements of the Social Security Act in exactly the same manner as it did at the outset of this lawsuit.

Respectfully submitted,

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June 5, 1969

Mr. James Callison, Regional Commissioner
Department of Health, Education and
Welfare
Region II
26 Federal Plaza
New York, New York 10007
Dear Mr. Callison:

We are forwarding nine copies of our proposed Board rules and department regulations implementing this year's legislation in respect to allowances and grants.

It is our intention to release them to the social services districts that they may be prepared to authorize and issue assistance to recipients on July 1, 1969 in accordance with the decision reached in the pending court action.

We would appreciate your prompt review and the benefit of any comments you may have.

Sincerely, George K. Wyman Commissioner

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PURPOSE AND SCOPE

This bulletin sets forth the standards, schedules and policies to be applied uniformly in determining financial eligibility for AABD, ADC and HR, in accordance with the Social Services Law, the Rules of the State Board of Social Welfare and the Regulations of the State Department of Social Services. It includes the treatment of resources in relation to established needs of the client. It also includes the required budget worksheet (Form DSS-548) and instructions for its use. Determination of financial eligibility for Medical Assistance is set forth in Bulletin 182, and for Surplus Foods in Bulletin 154a.

II. LEGAL BASIS

A. Social Security Act

The Social Security Act authorizes federal aid for specified public assistance programs, including AABD and ADC, administered or supervised by state welfare departments in accordance with an approved "State Plan". The United States Department of Health, Education and Welfare, which administers the Social Security Act and approves each State Plan, requires that it include standards and policies to be applied uniformly throughout the state in determining eligibility and the amount of assistance. Instructions, as well as standards and policies, must be clear and definite so as to provide a basis for objective and equitable determinations in every welfare district.

B. Social Services Law

Responsibility for providing adequate assistance and care to indigent persons is specifically provided for in relation to the several distinct assistance programs - AABD (for persons over 65, blind or permanently and totally disabled), ADC and HR, in accordance with schedules of allowances and grants.

Eligibility requirements mandate application of the means test and utilization of resources in accordance with the Social Services Law, the Rules of the Board and the Regulations of the Department.

III. OFFICIAL POLICY

A. Definitions

Board Rule Section 80.1

- (a) [Text omitted.]
- (b) When used in these rules and in department regulations, aid to the aged, blind or disabled or AADD shall refer to the combined program for aged, blind or disabled persons established under article 5 of the Social Welfare Law, exclusive of Medical Assistance for Needy Persons or MA.

B. Standards, Generally

1. Standards of assistance

Proposed Board Rule Section 82.9

Standards for meeting needs of persons who constitute or are members of a family household.

(a) In meeting the needs of applicants for, and recipients of, public assistance, the budgetary method shall be applied by all social services districts to the individual case to determine eligibility and the amount of the grant, in accordance with the regulations of the department. Such budgetary method shall mean the balancing of available resources against the estimate of regularly recurring need by applying the standards of assistance and the policies incorporated

in these rules and in the regulations of the department governing the exploration, evaluation and application of income and resources.

- (b) Standards of assistance and the policies related thereto for meeting needs shall be established in accordance with the provisions of section 131-a of the social services law, and they shall mean and include:
- (1) the schedules of allowances established by the department for all items of need exclusive of shelter;
- (2) the allowances for shelter established by each social services district in accordance with the regulations of the department.
 - (c) Such standards shall also include:
- appropriate provision for the additional cost of meals for public assistance recipients who live alone in accommodations without cooking facilities, in accordance with the regulations of the department approved by the director of the budget;
- (2) appropriate provision for the purchase of services, in accordance with the regulations of the department;
- (3) allowances for occupational training expenses in appropriate aid to dependent children and home relief cases, in accordance with the provisions of sections 159-a and 350 of the social services law and the regulations of the department;
- (4) allowances for the maintenance of a child in a summer camp, in appropriate aid to dependent children cases, in accordance with the provisions of section 350 of the social services law and the regulations of the department.

C. Needs

Department Regulation Section 352.4

(a) Of persons who constitute or are members of a family household.

- (1) For all items of need, exclusive of shelter, fuel for heating, additional cost of meals for persons who are unable to prepare meals at home, additional grants for replacement of clothing and furniture and allowance for occupational training, each social services district shall utilize the schedule of monthly grants and allowances applicable to it established in paragraph (2) of this subdivision.
- (2) The monthly grants and allowances shall be as follows:

[See schedules SA-1, SA-2, SA-3 and SA-4 in appendix.]

- (3) For the purpose of such monthly grants and allowances a child or children or adults residing with self-maintaining non-legally responsible relatives or friends, shall be considered as a holdhold separate from the self-maintaining relatives or friends.
- (4) (i) Each social services district shall make an allowance for fuel for heating when it is not included in the cost of shelter in accordance with the following schedule:

[See schedule SA-6 in appendix.]

- (ii) For children or adults residing with selfmaintaining non-legally responsible relatives or friends, an allowance for fuel for heating shall be pro-rated.
- (5) An additional allowance for fuel shall be granted when made necessary by exceptionally severe weather, overly exposed location or unusually poor construction of a dwelling, or by reasons of poor health. Circumstances requiring such additional allowance shall be fully recorded.

(6) Shelter

(i) Each social services district shall establish an allowance schedule for rent based on the number of rooms, with or without heat, utilities, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. Such schedule shall make provision for the payment of rent in state aided public housing and in middle income housing. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in excess of the appropriate maximum of such schedule. When the tenant recipient is obligated to pay for water as a separate charge, an additional allowance shall be made for the amount required to be paid.

- (ii) For children or adults residing with a selfmaintaining non-legally responsible relative or friend, the allowance for rent shall be pro-rated.
- (iii) An allowance for rent shall be made for a period not in excess of 60 days, when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

[Note: Except for New York City, an allowance for rent for recipients who are tenants of state aided public housing shall be made in accordance with the following procedure and standard:

The social services district shall advise the local housing authority that a tenant or an applicant for an apartment is receiving public assistance and that there are a specified number of persons in the household.

Families consisting of five persons or less will be charged the base rent applicable to the particular size apartment.

Families consisting of more than five persons will be charged the base rent applicable to the particular size apartment plus four dollars per month for each person in excess of five persons.

The social services district shall advise the local housing authority whenever a welfare tenant is removed from the public assistance rolls.]

[Note: Required fees or charges shall be provided for such items as security deposit, extermination, deposit against breakage and loss, and keys. See Section D - Purchase of Services.]

(iv) Shelter costs for client-owned property

(a) Carrying charges

On client-owned property used as a home, carrying charges shall be met in the amount actually paid by the recipient but not in excess of the appropriate maximum of the rent schedule for the items of taxes, interest on mortgage, fire insurance, water rates and assessments.

[See Department Regulation Section 352.7(c)(4).]

(b) Amortization

The amount required to amortize a mortgage on the recipient's property shall be included in the carrying charges when property is income-producing and the resulting carrying charges do not exceed the property income by an amount in excess of the maximum of the established rent schedule or when property is not income producing but it is essential to retain the home of the recipient and the carrying charges do not exceed the appropriate maximum of the established rent schedule.

[Note: When practicable, social services officials may exercise the rights prescribed in Section 106 of the Social Services Law concerning deeds or mortgages to be taken.]

(c) Property repairs

The cost of property repairs shall be met when:

- (1) the property is income-producing and the repairs are essential to retain that status; or
- (2) the repairs are essential to the health, safety or comfort of the recipient.

(d) Shelter costs for property deeded to social services official

Property on which a social services official has taken a deed under the provisions of Section 106 of the Social Services Law may be used to shelter a public assistance recipient, whether it be the former owner or other recipient. Allowances for fixed charges or repairs on such property constitute the cost of shelter of the recipient. For a multiple dwelling only that part of the total maintenance cost applicable to the space occupied by the recipient shall be used in computing the shelter allowance.

Allowances in lieu of rent Board Rule Section 80.12

(a) When allowance is required

In cases of temporary need a social services official shall include in the grants he makes to a recipient of AABD, HR or ADC who owns real property which he uses as his home, allowances in lieu of rent to enable such recipient to make payments required to be made on such property for mortgage installments, real estate taxes, fire insurance premiums, water charges, sewer rents and assessments, but such allowances shall not exceed the amount that such official would allow under his agency's rent schedule if the recipient were required to pay rent.

(b) When allowance is discretionary

In other cases a social services official may, in his discretion, include in the grants he makes to a recipient of AABD, HR or ADC who owns real property which he used as his home, allowances in lieu of rent to enable such recipient to make payments required to be made on such property for mortgage installments, real estate taxes, fire insurance premiums, water charges, sewer rents and assessments, but such allowances shall not exceed the amount that such official would allow under his agency's rent schedule if the recipient were required to pay rent.

(c) Application of income

However, any allowances made pursuant to this section shall be limited to the amount of any balance remaining to be paid on the charges enumerated above after income derived from the property has been applied towards the payment of such charges.

(d) Suitability of home

An allowance shall not be made under this section if the home is a hazard to the health or safety of the occupants or is not suitable for their needs.

Department Regulation Section 352.4 (continued)

- (v) If an applicant's furniture which is essential to making his living accommodations habitable is encumbered by a chattel mortgage or was purchased under a conditional sales contract, every effort shall be made to defer, cancel or reduce payments on such chattel mortgage or conditional sales contract. If all such efforts fail, an allowance may be made for a compromise settlement of such payments or, if a compromise cannot be reached, for other essential payments.
- (7) Provision for the additional cost of meals for persons unable to prepare meals at home shall be allowed in accordance with the following schedules:

[See schedule SA-5 in appendix.]

- (8) Grants for clothing and furniture in case of catastrophe
- (i) Each social services district shall make grants for partial or total replacement of clothing or furniture which has been lost in a fire, flood or other like catastrophe.
- (ii) Those grants for one or more items of clothing or furniture shall be based upon the current local price of such item, but shall not exceed the maximum allowances as follows:

[See schedule SA-7 in appendix.]

(9) Occupational training allowances for ADC and HR recipients

Allowance shall be made for the costs of tuition, books, supplies and other essential items required to enable an unemployed parent or minor between 16 and 21 years of age receiving ADC and any person receiving HR to obtain suitable occupational training from a trade school or other institution licensed or approved by the State Education Department, provided such person could not otherwise obtain such training without cost and demonstrates to the satisfaction of the social services official that he or she possesses the talent, aptitude and ability necessary to benefit from the proposed course of training.

- (10) Payment for services and supplies already received
 Assistance grants shall be made to meet only current needs.
 Under the following specified circumstances payment for services or supplies already received is deemed a current need.
- (i) If a check for a grant is reported lost or stolen, an affidavit of loss shall be required of the recipient and payment of the check shall be stopped. Such check shall be replaced. If payment cannot be stopped the agency shall claim state reimbursement on only one of the two checks.
- (ii) An allowance to meet the cost of rent shall be made for the entire month in which the case is accepted if essential to retain the living accommodation. A grant to meet the cost of such items as taxes and interest on mortgages may be made for the billing period immediately preceding acceptance, if such payment is essential to the health and safety of the recipient.
- (iii) A grant to pay for utilities already furnished to prevent a shut-off up to but not exceeding a four-month period immediately preceding the date of application for utilities for an applicant for assistance in the same dwelling for which he is applying for utilities.

[Note: Section 12 of the Transportation Corporations Law provides that gas or gas and electric corporations must provide service to recipients of assistance even though the recipient owes arrearages to the corporation for service provided in a prior dwelling place.]

- (iv) A grant may be made to pay for rent, taxes or mortgage for a period prior to the month in which case was opened or prior to the month in which a current bill was due when the case was opened under the following specified conditions:
- (a) such payment is essential to forestall an eviction and no other facilities are available; and
- (b) the health and safety of the applicant or recipient is severely threatened by failure to make such payments and
- (c) the authorization for payment of such a back bill receives special written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

[Note: Department Regulation Section 351.27 provides:

Correction of error by a social services official

- (a) A social services official may make a grant to correct an error which denied an application for assistance, discontinued a recipient from assistance or otherwise deprived a recipient of the full amount to which he was entitled, for a period not in excess of two months preceding the month in which the correction is made.
- (b) A social services official may make a grant to correct an error after a request for a fair hearing but prior to the hearing itself or the hearing decision, retroactive to the date the incorrect action was taken.]

[Note: Department Regulation Section 358.8 provides:

Correction of error pursuant to a fair hearing decision

When a fair hearing decision has ordered the correction of a discontinuance, the correction of a denial of an application for assistance, or the correction of the amount of assistance, a grant shall be made to cover the full amount to which the applicant or recipient was entitled in accordance with the decision for the entire period from the date the incorrect action was taken.]

- (b) Of persons whose living arrangements are board and room: care in a home for adults. convalescent home and home for the aged
- (1) For persons unable to be cared for in their own homes, board and room, care in a home for adults, convalescent home, home for the aged or other suitable facility shall be provided by the social services district. Each social services district shall establish rates for board, for board and room, and for care in a home for adults, a convalescent home, and a home for the aged, as follows:
- (i) For board and room: An amount to cover the cost of board, the laundering of linens, additional utilities and household supplies, plus room rent and plus a reasonable profit except where furnished to a relative.
- (ii) For care in a private proprietary home for adults or convalescent home: The lowest rate for which suitable care can be purchased from such facilities.
- (iii) For care in a non-profit home for adults, convalescent home, or home for the aged: The per diem cost of such care with due consideration to the services provided and the tax exempt status of the home.
- (2) Adult recipients living in a boarding home, home for adults or home for the aged and recipients receiving care in infirmaries, nursing homes or similar medical facilities shall be granted an allowance of \$15 per month for personal expenses, including clothing and incidentals.

[See bulletin 182, Board Rule Section 85.4(b) (2) (i) and Department Regulation Section 360.18.]

For patients incapable of handling cash, clothing and incidentals not provided by the facilities shall be provided in kind.

- (3) An allowance of the rate for shelter in a congregate facility shall be made for a period not in excess of thirty days when essential to retain place to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.
- (4) An allowance to meet the cost of board and room or care in a home for adults, convalescent home, or a home for the aged shall be made for the entire month in which the case is accepted if essential to retain the use of the facility. An allowance may be made to pay for the cost of such care for a period prior to the month in which the case was opened, but not prior to the date of application under the following specified conditions:
- (i) such payment is essential to retain the care in the facility and no other facilities are available; and
- (ii) the authorization for payment of such back bill receives written approval by the social services official or such other administrative officer as he may designate, provided such person is higher in authority than the supervisor who regularly approves authorization.

(c) Duplication of allowances and grants

Supplemental allowances and grants may not be made in excess of established schedules. If special allowances and grants are made which duplicate any grant and allowance already made, because the cash has been lost or stolen, such duplicate allowances and grants are not reimbursable by the state.

D. Purchase of Services Department Regulation Section 352.5

Each of the following services shall be purchased by the social services districts for the recipient in the amount necessary, whenever the special circumstances noted below are found to exist. The special circumstances and the considerations entering into the agency decision to provide such service shall be recorded. For each service purchased for which the department has not established the fee to be paid, each social services district shall establish the amount to be paid. For those services for which establishment of a flat fee or a range of fees is not practicable, the amount shall be filed with the department in accordance with Section 300.2 of the Regulations. [See Bulletin 153.]

- (a) Day care in a day care center, in a family home or approved "in home day care" shall be purchased when the homemaker is employed, is receiving occupational training, is physically or mentally incapacitated, or when family duties away from home necessitate her temporary absence. If "in home day care" is purchased by the social services district in the recipient's own home, provision shall be made for Workmen's Compensation and other benefits as required by or pursuant to law.
- (b) Homemaker service essential to meet social needs shall be purchased from an approved social agency when such service is not available through staff of the social services district.
- (c) Housekeeping services for a recipient who is unable to perform housekeeping tasks shall be provided. When it is not provided by staff of the social services district it may be purchased from another agency or from an individual. When such service is purchased from an individual by the social services district provision shall be made for Workmen's Compensation and other benefits as required by law.
- (d) [Illegible] when funds cannot be obtained from other sources, shall be paid for children receiving ADC not

in excess of total cost of \$96 per child for one-half of one percent of the total number of children receiving ADC in the social services district.

- (e) Household moving expenses shall be paid when a change of residence is necessary and other means are not available for payment of such expenses.
- (f) Security deposits, deposits against breakage or loss, extermination fees, finder fees or other charges related to securing or retaining shelter shall be provided.
- (g) Life insurance premiums shall be met when the policy is assigned to the agency or when the recipient is aged, his life expectancy is short, or he is deemed uninsurable.

[Note: Consideration shall be given to adjustment and to disability provisions.]

[Note: For health insurance premiums, see Bulletin 182 and Department Regulation 360.16(c).]

G. Budgeting

- The budgetary method Department Regulation Section 353.1
- (a) The budgetary method shall be applied to the individual case to determine eligibility and the amount of the grant and/or the fee to be paid for a purchase of service.
- (b) When the estimate of regularly recurring need exceeds the available resources, the difference shall be known as a budget deficit. When the available resources exceed the estimate of regularly recurring need, the difference shall be known as a budget surplus.
- (c) An individual or family shall be deemed in need when a budget deficit exists or when the budget surplus is inadequate to pay for a service required by the case circumstances.
- (d) Where investigation has been completed and need established on a continuing basis the regularly recurring cash grant shall meet the full budget deficit if there is one

and/or provision shall be made for the purchase of service when need is based on the need for such service.

(e) When an item, such as utilities, is paid by voucher or restricted grant, the amount paid shall be deducted from the ensuing regularly recurring cash grant, or grants when the amount is large.

[Note: Section 15 of the Transportation Corporations Law provides that it shall be unlawful for any gas or electric corporation to discontinue the supply of gas or electricity to any person or persons receiving public assistance, for non-payment of bills rendered for service, if the payment for such service is to be paid directly by the department of social welfare or the public welfare official in such locality.]

- (f) When the budget deficit increases between periods covered by the last regularly recurring grant, a special grant shall be made for the difference. This shall include the allowance necessary to provide for an additional member of the household on a pro-rated basis for a member of the public assistance household who returns home for a visit.
 - Persons included in the budget
 Department Regulation Section 353.2
- (a) For budgetary purposes the agency shall include in its estimate of need and application of income all persons applying for or receiving public assistance and care and living as a unit within the same household. This shall mean members of the family temporarily absent from the home such as children or minors attending school away from home, other than schools where maintenance is provided without cost.

The household of a pregnant woman shall be considered as increased by one person from the fourth month of the pregnancy which has been medically verified.

(b) A non-legally responsible relative in the household who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. A lodger or boarding lodger shall not be included in the budget. The amount of room and board which he pays shall be verified and that which is in excess of \$55 a month shall be considered as income to the family. The amount paid by a lodger shall be verified and that which is in excess of \$12 a month shall be considered as income to the family.

[Note: Rent, as paid, is budgeted for the assistance group, even though in excess of shelter schedule allowance, when lodging is furnished as in (a) or (b) above. Income received will, in effect, reduce shelter costs for assistance group by application of net income.]

 Estimate of need and application of income Department Regulation Section 353.3

(a) For applicant or recipient

- (1) The estimate of need for any applicant or recipient shall include all items of basic maintenance and items of regularly recurring special need specified in Section 352.5 of these regulations for persons in the circumstances under which such items are allowed. The amount to be included for each item of basic maintenance and for each item of special need shall be the appropriate amount provided in the allowance schedule for such item. However, the schedule allowance for items of basic maintenance or special need may, if insufficient, be adjusted when the individual circumstances are such as to require some modification of the scheduled amount and these circumstances have been verified and recorded. To the extent that an item of basic maintenance or special need is otherwise provided it shall not be included in the estimate of need, but the manner in which such item is provided shall be recorded.
- (2) (i) All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, including support payments required to be made by a parent pursuant to an order of the family court or other appropriate court, shall be pro-rated and applied against the needs of the applicant, the spouse and the minor children

of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own needs and any surplus against the needs of his dependents. These policies shall ordinarily be applied even though there is no legal marriage if the adults are generally regarded as man and wife.

- (ii) If there has been habitual failure to make court ordered support payments or where the circumstances are such that there are reasonable grounds to believe that such support payments will not be made, the income therefrom may be considered as irregular as to amount or uncertain as to receipt and the provisions of subdivision (d) of this section shall be considered as applicable.
- (iii) Failure to make at least three payments in full during the preceding three month period shall be deemed to constitute a habitual failure to make payments.
- (iv) The following shall constitute reasonable grounds to believe that court ordered support payments will not be made by the parent who has been ordered to make such payments:
- (a) the parent has failed to make at least three consecutive court ordered support payments in full; or
- (b) the whereabouts of the parent are unknown;
 - (c) the parent is known to be unemployed; or
- (d) the parent is confined to a medical institution or is obviously too ill or incapacitated to work; or
- (e) the parent is incarcerated in a penal institution.
- (v) In cases in which the parent is making payments on a regularly recurring basis, but in an amount less

than the amount stated in the court order, such lesser amount only shall be applied against the needs of the applicants or recipients in determining the amount of the grant.

[Note: There may be other circumstances which a social services official believes constitute "reasonable grounds" which have not been recognized. If so, these should be submitted to the department for consideration of an amendment to the regulation. The social services official is still responsible for continuing cooperation with the courts in order to enforce court ordered payments as provided in Department Regulation Section 351.2 pages 7-9 of Bulletin 91b.]

SCHEDULE SA-1 MONTHLY GRANTS AND ALLOWANCES

New York City

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
\$70	116	162	208	254	297	340	\$43

SCHEDULE SA-2 MONTHLY GRANTS AND ALLOWANCES

Counties of: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
\$65	107	149	191	233	270	307	\$37

SCHEDULE SA-3

MONTHLY GRANTS AND ALLOWANCES

Counties of: Albany, Broome, Cayuga, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Oneida, Onondaga, Ontario, Orange, Orleans, Oswego, Otsego, Putnam, Rensselaer, Rockland, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuylor, Seneca, Sullivan, Tioga, Tompkins, Warren, Washington, Wayne and Yates.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
\$62	104	146	188	230	267	904	\$37

SCHEDULE SA-4

MONTHLY GRANTS AND ALLOWANCES

Counties of: Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Steuben and Wyoming.

Number of Persons

One	Two	Three	Four	Five	Six	Seven	Each Additional Person
\$59	101	143	185	227	264	301	\$37

SCHEDULE SA-5

RESTAURANT ALLOWANCE SCHEDULE

Monthly allowances to be added to appropriate monthly grants and allowances for combinations of restaurant meals and meals prepared at home, including sales taxes.

Dinner in a restaurant	\$26
Lunch and dinner in a restaurant	43
All meals in a restaurant	58

SCHEDULE SA-5a

RESTAURANT ALLOWANCES FOR AN EMPLOYED ADULT

Breakfast	\$.75
Lunch	.90
Dinner	1.30

SCHEDULE SA-6

MONTHLY ALLOWANCES FOR FUEL FOR HEATING

New York City	& Counties o		ess, Monroe Westcheste		Suffolk,
	1 & 2 Persons	3 & 4 Persons	5 & 6 Persons	7 & 8 Persons	9 & 10 Person
Year Round Bas	is \$14.80	15.00	16.60	18.20	19.70
Eight Months Ho ing Season	20.50	21.00	23.35	25.75	28.40
Counties of: A	Allegany, Chau	utauqua, E	rie, Genesee	, Niagara,	Steuber
Year Round Bas	is \$12.60	14.00	15.40	18.20	21.00
Eight Months Ho ing Season	19.00	21.10	23.10	27.40	31.60
City of Jamesto	wn:				
Year Round Bas	sis \$ 9.20	9.70	11.00	12.20	13.30
Eight Months He					
ing Season	12.40	13.30	15.00	16.80	18.60
b	Albany, Broom ia, Cortland, Drange, Orlean iarie, Tioga, W	Greene, Livns, Putnam	vingston, O , Rensselae	nondaga, C	Intario,
Year Round Bas	is \$15.50	17.10	20.20	23.40	26.60
Eight Months He ing Season	eat- 22.60	25.00	29.70	34.40	39.20
e e	Cattaraugus, D Oneida, Otsego ca, Sullivan, T oming.	o, Saratoga	, Schenecta	dy, Schuy	lor, Sen
		18.80	22.30	25.80	29.20
Year Round Bas	as \$17.00	10.00	22.50	25.00	27.20
Year Round Bas Eight Months Ho ing Season		27.40	32.60	25.00	27.20

Counties of: Clinton, Essex, Franklin, Hamilton, Herkimer, Jefferson, Lewis, Oswego and St. Lawrence.

	1 & 2 Persons	3 & 4 Persons	5 & 6 Persons	7 & 8 Persons	9 & 10 Persons
Year Round Basis	\$18.60	20.50	24.30	28.10	31.80
Eight Months Heat ing Season	27.10	30.00	35.60	41.30	47.00

SCHEDULE SA-7 MAXIMUM REPLACEMENT COST OF CLOTHING

	Column 1	Column II
	Spring and Summer	Fall and Winter
Birth to one year	\$43.00	\$ 38.00
1 through 5 years	34.00	49.00
6 through 11 years - Girls	60.00	75.00
Boys	54.00	78.00
12 through 18 years - Girls	82.00	100.00
Boys	62.00	83.00
Women	79.00	100.00
Men	60.00	83.00

MAXIMUM REPLACEMENT COST OF ESSENTIAL HOUSEHOLD FURNITURE, FURNISHINGS, EQUIPMENT AND SUPPLIES

Number of Persons

	One	Two	Three	Four	Five	Six
	\$374	404	519	557	693	740
If not furnished landlord, add:	d by					
Cabinet for linens	20	20	20	20	20	20
Gas range for cooking	165	165	165	165	165	165
Refrigerator	165	165	165	220	220	220
Gas stove for heating	65	65	65	65	75	75

AA. Revised Memorandum of Judge Weinstein Granting Preliminary Injunction and Summary Judgment (Original Document Nos. 57, 78)

[Title omitted in printing]
[PRELIMINARY INJUNCTION]
May 15, 1969

WEINSTEIN, D.J.

[5] Plaintiffs bring this class action to challenge the validity of section 131-a of the New York Social Services Law, effective July 1st of this year (ch. 184, L. 1969). They allege that it is void because it does not meet the standards laid down by section 402(a) (23) of the Social Security Act of 1935, as amended in 1968, for participation by a state in the federally-funded Aid to Families with Dependent Children program (AFDC). See 42 U.S.C. § § 601, 602; 45 C.F.R. § 233.20(a) (2) (i), 34 Fed. Reg. 1394 (1969). Section 402(a) (23), they contend, requires a state, if it is to participate in AFDC, to take into account increases in the cost of living in computing new benefit levels. Their claim is that New York State, while it continues to participate, has reduced scheduled AFDC payments.

Both plaintiffs and defendants have moved for summary judgment. In addition, plaintiffs have moved for a preliminary injunction to enjoin the defendants from instituting changes pursuant to section 131-a until this litigation can

be decided on the merits.

The test for granting summary judgment is whether there exists "any 'genuine issue as to any material fact', [6] F.R. Civ. P. 56(c); see, F.R. Civ. P. 56(e)." Waldron v. Cities Service Co., 361 F.2d 671, 672 (2d Cir. 1966), aff'd sub nom. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968). The test for granting a preliminary injunction is whether plaintiffs have made "a clear showing of probable success and probable irreparable injury." Clairol Incorporated v. Gillette Company, 389 F.2d 264, 265 (2d Cir. 1968). See F.R. Civ. P. 65.

For the reasons stated below, it is clear that plaintiffs have a substantial claim with a high likelihood of prevailing on the merits and that they will probably suffer irreparable damage unless a preliminary injunction is granted. Accordingly, such an injunction will issue.

There are still a number of unresolved questions of fact. The statistical and other data underlying this dispute have not yet been developed with clarity sufficient to warrant the granting of summary judgment. Pursuant to Rule 56 (f) of the Federal Rules of Civil Procedure, this Court orders "a continuance to permit affidavits to be obtained or depositions to be had" or testimony and exhibits to be presented.

[7] Because of the importance of this matter we assume that defendants will wish to take an immediate interlocutory appeal pursuant to section 1292(a) (1) of title 28 of the United States Code from the order granting the preliminary injunction. In order to render as much assistance as possible to the Court of Appeals and to the parties we have set out below the posture of the case in more detail than is ordinarily warranted in disposing of preliminary applications. It should be emphasized that the conclusions are made only for the purpose of deciding the motions before us and are not determinative of the merits of the case.

[8] I. JURISDICTION

In King v. Smith, 392 U.S. 309 (1968), the Supreme Court left open the question "whether and under what circumstance suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." 392 U.S. at 312, n. 3. Since plaintiffs' equal protection claim is no longer before this Court (Rosado v. Wyman, _____ F. Supp.

___ (E.D.N.Y. 1969) per curiam opinion of three-judge court), we must confront the question of our jurisdiction to decide the federal statutory claim. We conclude that there are a number of independent bases of jurisdiction.

A. Pendent Jurisdiction

Once its jurisdiction has been properly invoked, a federal district court acquires pendent jurisdiction to decide all related claims arising out of the same transaction or dispute. See, e.g., United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn v. Oursler, 289 U.S. 238 (1933); Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968). The district court has power to decide the pendent claim even if it does not reach the issue which provided the basis for the court's jurisdiction or even if it first decides the jurisdiction founding issue against the plaintiffs. [9] See, e.g., King v. Smith, 392 U.S. 309 (1968); United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Gulickson v. Forest, 290 F. Supp. 457, 464 (E.D.N.Y. 1968).

In the present case, it is clear that at the time the threejudge court was convened jurisdiction existed pursuant to section 1343(3) of title 28 and sections 1983 and 1988 of the United States Code. These provisions grant original jurisdiction to the federal district courts, without respect to the amount in controversy, over cases where it is claimed that a right under the United States Constitution is being violated. The three-judge court, in its per curiam opinion, noted that it had been "properly convened" (Rosado v. Wyman, _ F. Supp. __, _ (E.D.N.Y. 1969)), thereby impliedly ruling that a substantial federal queston had been raised. See, e.g., Swift & Co. v. Wickham, 382 U.S. 111, 115 (1965) ("no such court [three-judge court] is called for when the alleged constitutional claim is insubstantial"); Kramer v. Union Free School Dist. No. 15, 379 F. 2d 491 (2d Cir. 1967). There is no doubt that under the liberal test recently enunciated by the Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the cause of action based on the Social Security Act would be considered pendent to the equal protection claim.

[10] The question posed is whether this Court has been divested of pendent jurisdiction because the federal constitutional claim was rendered moot after the three-judge

court convened and heard argument on motions by all parties for summary judgment. For the reasons stated below, we hold that under the circumstances of the instant case, this question must be answered in the negative.

Federal courts, in the exercise of discretion, have tended to voluntarily abstain from deciding pendent questions where the claim which provided the basis for its jurisdiction has been disposed of prior to trial. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well"); Wham-O Mfg. Co. v. Paradise Mfg. Co., 327 F.2d 748, 752-54 (9th Cir. 1964); Strachman v. Palmer, 177 F.2d 427, 431 (1st Cir. 1949) (concurring opinion); Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1025 (1967); cf. Clairol Incorporated v. Gillette Company, 389 F.2d 264, 267-268 (2d Cir. 1968) (jurisdiction over unfair competition claim despite concession of lack of valid trademark registration); Rogers v. Valentine, 37 F.R.D. 231 [11] (S.D.N.Y. 1964) (after summary judgment granted on federal claim, jurisdiction retained over pendent non-federal claim).

The rationale for this doctrine of restraint in the exercise of pendent jurisdiction is that a federal court should seek to avoid "[n] eedless decisions of state law":

Needless decisions of state law should be avoided both as a matter-of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *United Mine Workers v. Gibbs*, 363 U.S. 715, 726 (1966).

See also Wham-O-Mfg. Co. v. Paradise Mfg. Co., 327 F.2d 748, 753 (9th Cir. 1964), Struchman v. Palmer, 177 F.2d 427, 431, 433 (1st Cir. 1949) (concurring opinion). Accordingly, applying what has been referred to as "the introduction of evidence test," some federal courts have held that "when a federal claim is dismissed on the pleadings, the court should not retain a related nonfederal claim ab-

sent an independent basis for federal jurisdiction." Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018,

1025 (1962) (emphasis in original).

Application of this rule would be entirely inappropriate, wasteful of judicial energy and extremely prejudicial to the litigants in a case such as the one before us. The pendent [12] claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designed to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.

We do not mean to suggest that the New York State courts would be more likely to fall into error or to show hostility toward federal law than would a federal court. We are only deciding now whether it is appropriate for a federal court to divest itself of jurisdiction of a pending case.

Factors to be taken into account in deciding this question include "judicial economy, convenience, and fairness to litigants." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). These criteria provide justification for the doctrine of pendent jurisdiction generally; they compel re-

tention of jurisdiction in the instant case.

[13] A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the tes-

timony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. The resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date—July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

Having found that pendent jurisdiction exists, we need not reach the question whether administrative remedies must be exhausted in a suit challenging a state AFDC provision [14] solely on statutory grounds. See King v. Smith. 392 U.S. 309, 312, n.4 (1968); Rosado v. Wyman, _____ F. Supp. ____ (E.D.N.Y. 1969) (HEW not necessary party); cf. Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967) (inadequacy of federal administrative forum).

B. Federal Question Jurisdiction

Section 1331 of title 28 of the United States Code also supports jurisdiction. This provision grants the district courts jurisdiction over all civil actions arising under "the Constitution, laws, or treaties of the United States" provided that "the matter in controversy exceeds the sum or value of \$10,000."

There is no doubt that the first requirement is met since plaintiffs allege that the challenged state statute violates section 402(a) (23) of the Social Security Act. Defendants contend, however, that the controversy does not involve more than \$10,000.

In determining whether this prerequisite has been satisfied in a class action of this kind, the claims of the individual plaintiffs or individual members of the class may not be aggregated. Snyder v. Harris, _U.S. _, 37 U.S.L.W. 4262 (1969). Compare 1 Moore, Federal Practice Par. 0.91[1] at p. 827 (2d ed. 1964) with Wright, Federal Courts 100 (1963). Nevertheless, for purposes of jurisdiction in this case, [15] each family may be considered as a unit and the claims of each member of a single AFDC family can be combined because the federal statutory program involved is designed to protect the family as a unit.

If we only look to the impending reductions in welfare payments that any family in the class may suffer, the monetary loss to each of the plaintiffs does not approach \$10,000. Yearly welfare payments may not be multiplied by a number of years in the future to make up the \$10,000 requirement because it is too speculative to assume that any particular plaintiff will remain on welfare for such a period or that the program will remain unchanged.

While the direct damage to each member of the class does not suffice, the indirect damage to each plaintiff and her charges may be very high. The test for determining the amount in controwersy relies heavily upon plaintiffs' good faith and the certification of lawyers pursuant to Rule 11 of the Federal Rules of Civil Procedure that there is "ground to support" the pleadings. It has been described by the Supreme Court as follows:

The rule governing dismissal for want of jurisdiction in cases brought in federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938).

[16] See also Horten v. Liberty Mutual Ins. Co., 367 U.S. 348, 353 (1960); Wright, Federal Courts 94-95 (1963).

There is before this Court uncontradicted evidence, by testimony and affidavits, that members of the class are at or below a bare subsistence level. Under such circumstances,

a reduction in welfare benefits putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits. Cf. Brown v. Board of Education, 347 U.S. 483, 494 (1954) (psychological damage resulting from improper schooling). Deprivations during early years may irreversibly retard mental and physical development and have an adverse impact on personality.

Without intimating that the position of these plaintiffs is at all comparable, the possibility of a serious injury resulting from a comparatively minor deprivation may be more clearly seen if we look at the situation of a Biafran child. A few cents a day is enough to prevent starvation or permanent maiming of such a child; several dollars a year might mean the difference between a healthy life and a stunted life or death. Certainly, to such a child, the question whether \$10 in foodstuffs should be granted or withheld over a period of a year involves the monetary value of a human life.

[17] We need not go outside the record in this case to consider general literature and Congressional hearings on the grave and permanent harm, particularly to the children involved, that might result from a reduction in welfare payments. Typical of the material before this Court are some of the affidavits quoted below.

A Professor of Pediatrics and Attending Physician in a ghetto hospital with "a great many patients who are recipients" of public assistance swears that many of them "have marginal nutritional status;" that "a decrease in the amount of subsistance which these individuals receive for the purchase of food would create a deficiency in their diets and could lead to clinical malnutrition;" that "malnutrition tends to retard the physical and mental growth" of children and "may greatly diminish the ability of the ndividual to learn;" that this deficiency "will remain with the individual for life;" that children born of "undernourished mothers" have a substantially increased tendency to premature birth with "greater incidence of infant mortality and an

increased likelihood of mental and neurological damage;" and that elimination of special diets and other assistance by reductions such as those proposed by the statute in question will cause damage "to individual recipients . . . so

great as to be incalculable."

[18] A Senior Social Worker at a Medical Center swears that "at existing welfare levels most welfare recipients live in a state of constant anxiety, depression, frustration, and physical suffering due to the inadequancy of their welfare grants" and as a result of the proposed reductions the "suffering which will result . . . will cause irreparable, and incalculable, harm."

A Certified Social Worker with 28 years experience, employed by the Community Service Society of New York, Inc., swears that as a result of the reductions, "Serious unattended health problems will multiply and proliferate, children's ability to achieve in school will be even further depleted, diets will be at a starvation level as families try to stretch their grossly inadequate budgets to meet their most basic needs. . .;" and that "Family life, already strained, will be . . . severely jeopardized."

The Chief of Budget Standard Service of the Community Council of Greater New York swears that "deprivation [from the new proposed standard] will result in incalculable hardship and misery to the already severely deprived families

in our community."

[19] A Dean of a School of Social Work swears that the proposed reduction will cause "great harm to the physical, mental, emotional and moral health of these families."

A Professor at a medical college and Director of a Neighborhood Health Center swears that "any diminution in income [of the families involved in this litigation] will worsen an already intolerable situation, resulting in irreparable damage."

A Retired Medical Director of the United States Public Health Service serving as Deputy Director of Obstetrics and Gynecology at a ghetto hospital and Professor at a college of medicine swears that "the possible harm afflicted upon pregnant mothers and newborn children is incalculable." In view of the relatively trivial injuries which result in recovery of more than \$10,000 in this Court, it cannot be said that under no view of the facts is the amount in controversy less than \$10,000 as to any member of the class. We do not, of course, in considering this jurisdictional matter, pass upon, or express any view with respect to, the accuracy of the affidavits quotec.

C. Jurisdiction Under 28 U.S.C. § 1343(3)

Plaintiffs also invoke sectior 1343(3) of title 28 of the United States Code as a basis for jurisdiction. [20] This provision grants the district courts original jurisdiction of any civil action, irrespective of the amount in controversy, to "redress the deprivation under color of any State law ... of any right privilege or immunity secured by ... any Act of Congress providing for equal rights of citizens." Plaintiffs assert that this section, when read with section 1983 of title 42, grants federal courts jurisdiction over controversies involving substantial individual rights protected by federal welfare statutes. Because jurisdiction to decide the statutory claim of invalidity is clearly founded both on section 1331 of title 28 and upon pendent jurisdiction arising from section 1343 (3) of ttle 28, we need not and do not address ourselves to this position. Cf. King v. Smith, 392 U.S. 309, 312, n. 3 (1968). Compare Cover, Establishing Federal Jurisdiction in Actions Brought to Vindicate Statutory (Federal) Rights When No Violations of Constitutional Rights Are Alleged, Clearinghouse Review, February-March, 1969 at p. 5: Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 112-14 (1967) with Note, The Proper Scope of the Civil Rights Acts, 66 Harv. L. Rev. 1285, 1291-93 (1953).

[21] II. GENERAL NATURE OF FEDERAL-STATE PROGRAM FOR AID TO FAMILIES WITH DEPENDENT CHILDREN

New York, together with every other state, participates in the AFDC program established by the Social Security Act of 1935. Section 401 of the Act provides that the fed-

eral government shall make "payments to States which have submitted, and had approved by" the federal government "State plans for aid and services" to "needy children and the parents or relatives with whom they are living." These federal payments are made on a matching fund basis. Administration of the program is entirely in the hands of the states, although each state's plan must meet the several requirements of the Social Security Act and the rules and regulations promulgated by the United States Department of Health, Education, and Welfare (HEW). 42 U.S.C. § 602. See King v. Smith, 392 U.S. 309 (1968).

Each state participating in AFDC must formulate, in monetary amounts, standards of need and levels of benefits based upon these standards. 45 C.F.R. § 233.20(a)(2) (i), 34 Fed. Reg. 1394 (1969). Theoretically, a standard of need is equal to the total cost of all of the items deemed to be necessary for subsistence. Those whose incomes are below the applicable standard of need are eligible for welfare assistance.

[22] A state is free to determine the items, and their costs, to be included in a standard of need. In practice, it may not include all the necessary items or the prices used may not reflect true cost. That this is often the case is evidenced by affidavits and supporting memoranda submitted to the Court establishing that welfare budgets tend to be below the level which most studies indicate is necessary for normal daily functioning and healthy family life.

Were a state paying 100% of its standards of need, the amount of the welfare grant to a recipient would be equal to the difference between his income and the applicable standard of need. But, many states' levels of benefits are not determined solely by their standards of need. Some impose a flat maximum on the amount of the benefit—i.e., no family can receive a welfare grant of more than a stated number of dollars, an amount which varies according to the size of the family, even if this sum does not fully cover the budgetary deficit indicated by its own computation. Other states apparently pay only a fixed percentage of need—e.g.,

if the standard of need were \$100 per month, the state would pay 80% of need and a person without other income would thus receive only \$80 per month.

[23] Since "each State is free to set its own standard of need and to determine the level of benefits" (King v. Smith, 392 U.S. 309, 318-19 (1968)), the sums paid by different states to comparable families under the AFDC program vary considerably. Thus, 29 states pay 100% of what they define as standards of need, while Mississippi pays only 27% of its standards of need. The average monthly AFDC payment per recipient, as of June, 1968, ranged from a high of \$71.75 in New York to a low of \$8.50 in Mississippi.

III. NEW YORK'S CURRENT PROGRAM

Under present law, New York's levels of benefits have purportedly been designed to fully make up budgetary deficits as defined by its standards of need. The New York Department of Social Services is authorized to establish grant levels "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities." N.Y. Soc. Serv. § 131(3). Pursuant to section 131 of the New York Social Services Law, the Regulations of the Department of Social Services provide that "all items of basic maintenance and all items of special need required by [individual] case circumstances" shall comprise the recipient's "estimate of regularly recurring need" and are to be included in the [24] welfare budget. 18 N.Y.C.R.R. § 353.1(d). The "recurring cash grant shall be the full budget deficit,"-that is, the excess of "the estimate of regularly recurring need" over the recipient's "available resources." 18 N.Y.C.R.R. §§ 353.1 (a), (d); 353.3(a). See also 18 N.Y.C.R.R. § 353.1(c) (a person shall be eligible for assistance if a "budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs").

New York welfare allowances have consisted of two separate types of grants. First, the basic, recurring grant to

cover food, clothing, household supplies, school expenses, and other items of basic subsistence, exclusive of rent and fuel for heating which are added to the allowance of the recipient on a separate basis. The amount of this grant varies with the size of the family and the age of the oldest child (18 N.Y.C.R.R. § 352.4 (a), (b)) because older children, particularly growing teenagers, require more in the way of food and clothing.

Payments are presently made according to three schedules promulgated by the State Commissioner of Welfare. One of them, set out below, covers the area of New York City [25] and nearby counties where most persons receiving aid reside.

SCHEDULE SA-I

VEW YORK CITY AND COUNTIES OF: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westches Monthly

					-			-	-	-
	One Person	Two Persons	Three Persons	Four Persons	Five Persons	Six Persons	Seven Persons	Eight Persons	Nine Persons	Ten Person
Oldest child 5 years										
f age or under		. 94	125	*152	*180	*204	*234	*262	*293	*320
Oldest child 6 or 7		107	*138	*165	*192	*216	*246	*275	*304	*333
Oldest child 8 or 9		107	152	*178	*205	*228	*259	*288	*317	*344
Oldest child 10 or 11		107	152	191	*218	*240	*271	*300	*329	*356
Oldest child 12 or 13		118	162	201	240	*262	*292	*321	*351	*378
Oldest child 14 or 15		118	173	211	250	283	*314	*318	*372	*400
Oldest child 16 or 17		118	173	221	259	293	335	*364	*394	*42
Oldest child 18 or 19		118	173	221	269	302	345	386	*415	*44.
Oldest child 20 or 21		118	173	221	269	312	354	395	437	*46
Adults	66	110	156	198	238	274				

^{*}When there is more than one adult in households with an asterisk, add \$16 for each additional ad

For a pregnant woman in any size household, add \$5.50.

For an AABD recipient living alone, add \$8. [Aid to Aged, Blind and Disabled.]

For each AABD recipient in a family group, add \$5.

For each additional person over 10 in the household, add \$32.

Any recipient under age 21 is budgeted as a child unless he is receiving assistance as the parent of a mihild and is not regularly attending school. When not budgeted as a child, such minor is budgeted as an ad[26] The other two schedules, covering upstate areas, are similar in form but somewhat lower in amounts.

In August of each year, the Department of Social Services has adjusted these schedules, based on a cost-of-living survey conducted in May of the same year, to reflect changing price levels. Since prices have been rising for some time, the yearly adjustment has required increases in standards of need and levels of benefits. Schedules presently in effect are based on a May, 1968 cost-of-living survey. They were issued on August 23, 1968 and each local Department of Social Services was required to implement them within nine months of August 1, 1968.

As supplements to the basic grant shown in Schedule SA-1. above. New York provides what it calls "special needs" grants. Special needs grants are designed to cover expenses for extraordinary or non-recurring items such as major items of clothing and furniture and household supplies (18) N.Y.C.R.R. §§ 352.4(c), 352.5(j), medically-dictated special diets (18 N.Y.C.R.R. § 352.4 (b) (7), (8), (9)), moving expenses (18 N.Y.C.R.R. § 352.5(m)), and expenses incident to education (18 N.Y.C.R.R. § 352.5(d)). See also 18 N.Y.C.R.R. §§ 352.4(c) (iv) (layette); 352.4(b)(6)(i) (restaurant allowance for persons unable to prepare meals at home); 18 N.Y.C.R.R. 352.5(b), (c) (expenses incident to employment and securing employment); [27] 351.5(g) (child care services); 352.5 (h) (laundry services); 352.5 (i) telephone service when such service is incident to the production of income, health, or safety); 352.5 (p) (transportation expenses to secure medical care or other essential verified transportation needs). These grants are required because it is recognized that the basic schedules provide no surplus from which additional needs can be met.

Pursuant to a "demonstration project" instituted on August 27, 1968 in New York City, many—but not all—of the special needs grants for City residents were replaced by a flat grant of \$100 per year per person. A family of four, for example, would receive \$400 per year. This flat grant was designed to eliminate the necessity of the welfare reci-

pient applying for many small individual items as they were needed.

Affidavits, studies and testimony before the Court agree that the present schedules, as supplemented by cyclical grants and special grants, are not in excess of present minimum requirements for life at the lowest acceptable level in New York. As the Commissioner of the Nassau County Department of Social Services put it, speaking of the presection 131-a situation, "the present standards of assistance provide for life on a level of sustenance, nothing more, and often less." Or, as the Deputy Commissioner in the State [28] Department of Social Services testified, AFDC recipients "of necessity have learned to squeeze every penny."

IV. NEW YORK'S NEW PROGRAM

Section 131-a is intended to substantially alter the welfare system in New York State beginning in July, 1969. In place of the present administratively drawn schedules based on annually determined costs of living, the size of the family and the age of the oldest child, it substitutes a system of flat grants set by the legislature and varying solely with the size of the family. All special grants, including the \$100 flat cyclical grant for New York City residents are abolished (except for the special grant for the replacement of clothing and furniture destroyed by flood or fire). Two separate schedules of payments are created one solely for New York City and a lower one for the rest of the state. The levels of payments established by the latter schedule may be increased administratively in any social services district within the state based on the cost-of-living, so long as it does not exceed the schedule for the City of New York. See Rosado v. Wyman, F. Supp. (E.D.N.Y. 1969) (threejudge court).

Set out below is the statutory schedule of maximum grants to residents in the City of New York:

[29] Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
One	1 110		1 1990		*****	2240
\$70	\$116	\$162	\$208	\$254	\$297	3340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

To these sums is added the cost of rent and fuel. This schedule and the one for the rest of the state, the statute declares, "shall be deemed to make adequate provision for all items of need."

The State's brief describes "the method of establishing the levels set forth in the schedules contained in the statute" as follows:

The mean age of the oldest child in each size family was ascertained. The mean age rather than the median was used as this produced a more generous result in most cases. The amount of allowance provided in 1968 for a family of each size in cases where the oldest child was of the mean age was then adopted as the allowance for that size family. Where the mean age contained a fraction, the older age was used, again working a benefit to the recip-Thus, for a family of four, which received amounts ranging from \$152.00 to \$221.00 (depending upon the age of its oldest child), the mean age of such oldest child was found to be 10.09 and, therefore, \$191.00, the figure where the oldest child was ten or eleven, was used [30] as a base amount. To this was added \$17.00-the amount necessary to bring the allowance up to \$35.35, the subsistence level determined by the United States Government for New York City for a family of four, or a monthly allowance of \$208.00. The allowance for the remain der of the state was determined at a differential of \$25.00 for a family of four. As the computations of the Department show, these levels, based on the previous allowance including the cost of living increases of 1968, will result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children. Memorandum of Law in Support of Defendants' Motion for Summary Judgment, pp. 9-10.

It is not yet clear how such a statistically even-handed technique resulted in even steps of either \$43 or \$46 as the size of the family increased.

Special grants were seemingly not included in these computations. No attempt was made to average them out across the state and then to add that figure to that of the basic recurring grant.

Each of the individual plaintiffs in this action will suffer substantial cuts ranging up to 20% in their welfare payments as a result of section 131-a. Set out below is a table listing the individual plaintiffs, the number of dependents of each plaintiff, the monthly grant [31] exclusive of rent each is currently receiving, and the maximum under section 131-a that each may receive.

Plaintiff	Size of Family And Age of Oldest Child	Current Grant	Maximum Under 131-a
Rosado	5 people, oldest child 14	\$280	\$254
Hernandez	3 people, oldest child 16	\$218	\$162
Miley	10 people, oldest child 15	\$535	\$469
Abrom	7 people, oldest child 13	\$406	\$340
Gathers	7 people, oldest child 19	\$382	\$340
Lowman	8 people, oldest child 14	\$396	\$383
King	9 people, oldest child 17	\$482	\$426
Folk	4 people, oldest child 16	\$337	\$208
Phillips	5 people, oldest child 14	\$314.40	\$224
Duffy	10 people, oldest child 20	\$563.40	\$389

(Plaintiffs Phillips and Duffy are residents of Nassau County. If they resided in New York City, or if the Commissioner of Social Services increases their maximums as much as the statute permits, their respective maximums under section 131-a would be \$254 and \$469.)

As a result of the abolition of special grants, plaintiff Abrom will not receive the following grants now supplied to her: \$15 a month for large sized clothing for her children; \$15 a month for medically required special diets; [32] and \$5.80 a month for the laundry of diapers. Plaintiff Miley will not be able to receive the following special grants now supplied; \$155 a month for a homemaker and \$9 a month for a telephone, both required for medical reasons; and \$80 a month for special diets for herself and her family.

V. EFFECT AND PURPOSE OF NEW YORK'S NEW PROGRAM

In the state's view it "was not the case" that section 131-a resulted in a "reduction of standards;" rather, it contends, section 131-a was intended to, and did, maintain the standard of need while providing administrative streamlining. Reply Memorandum for Defendants, pp. 7-8. Its brief declares:

the adoption of § 131-a was the fruit of continuous legislative and departmental study of the problem of maintaining a standard of need during a period of sharply increasing numbers of recipients, especially in the ADC program. To avoid a reduction, administrative streamlining and elimination of individual determinations of eligibility for a plethora of special grants was regarded as essential. *Ibid.*

The advantages of a system of flat grants to the recipient are, the state contends,—and the plaintiffs do not dispute this-substantial:

the flat grant concept, regarded as the most enlightened and progressive method of public assistance payment, eliminating the necessity of the welfare recipient applying for individual items—often a degrading and time-consuming process—and thereby enhancing his dignity, increasing his ability to budget and self-respect, and freeing case workers from bookkeeping decisions in order to allow them to devote their time to counseling of recipients. Memorandum of Law In Support of Defendants' Motion for Summary Judgment, p. 8.

The state's position that section 131-a was designed to reform New York's welfare system and eliminate administrative expense is belied by the statistical information presently available to this Court and the legislative history of the new statute.

A. Effect of Section 131-a on Standards of Need and Levels of Benefits

The data before this Court indicates that section 131-a affects a reduction of New York's standards of need and levels of benefits. While a large percentage of families, particularly those living outside the New York City metropolitan area with young children and with little need for special grants, will receive more under the new system than they do at present, a substantial majority of the AFDC families in the state will suffer a reduction in their payments on July 1, 1969. The amount of the reductions is not yet clear.

[34] Most beneficiaries of the AFDC program live in New York City (657,000 out of a state total of 887,000 was the 1968 monthly average). The Acting Deputy Director of the Bureau of Fiscal Administration of Social Services of the City of New York has made the following computations of the effect of section 131-a based upon statistics supplied by a State Department of Social Services study of July, 1968 and 1969-70 caseload projections:

The total benefits lost to clients [in New York City] will be \$39,142,678. 63.5% of the cases will lose while 36.2% gain. The average annual loss per case will be 343.81 while the average gain is 145.55.

These computations have been controverted by defendants' testimony which indicates that 41.5% of AFDC cases would receive increases, 58.1% would receive decreases and .04% would remain unchanged. One reason for the discrepancy appears to be that defendants' estimates, unlike plaintiffs' are based only on a comparison of the recurring grant and do not attempt to calculate the effect of eliminating the special and cyclical grants.

The effect on upstate residents seems to be less severe; according to defendants, approximately 51% suffer cuts, while 49% are afforded increases. Any possible gain to up-

AFDC recipients, probably does not offset the reductions [35] to City residents of total amount of aid paid. It is not yet clear whether this result would be changed if counties outside New York City took advantage of the opportunity afforded by the amendment to section 131-a discussed in the per curiam opinion of the three-judge court, Rosado v. Wyman, F. Supp. (E.D.N.Y 1969), and raised their schedules of payments to New York City levels.

Computations of loss by the parties apparently do not include allowance for a cost-of-living adjustment which has heretofore been made administratively each year in May. Under section 131-a, no cost-of-living adjustment will be made in 1969 even though it is undisputed that the New York City Area Consumer Price Index has risen at an average rate of 0.5% per month in the last two years and that the rate of increase has accelerated since February of this

year.

Defendants argue that the elimination of the cyclical grant and the special grants are not to be considered in determining whether the standard of payment has been reduced. First, they argue that these grants "were over and above New York's payment of 100% of its standard of need" and, thus, "totally gratuitous on the part of the State." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 25. This argument is difficult to credit. The testimony of witnesses for the plaintiffs and the witness for the defendant agree that New York does not pay more than is [36] required for bare subsistence. Special grants are not luxuries; they are merely a different method for meeting family and individual need for bare necessities. In fact, New York's definition of the standard of need prior to adoption of section 131-a included items covered by special grants:

An individual or family shall be deemed "in need" when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and

included in the standards of assistance. 18 N.Y.C. R.R. # 353.1(c).

See also 16 N.Y.C.R.R. \$ 353.1 (d) ("all items of basic maintenance and all items of special need required by case circumstances" comprise the recipient's "estimate of regularly recurring need").

Second, defendants suggested on argument that the State Commissioner of Welfare was considering the option of regulations providing for some of the special grants "on a purchase of service basis." To date we have not been favored with a copy of such regulations. It is not clear whether these regulations will, if adopted, cover cyclical or special grants to the same extent as they were covered prior to adoption of section 131-a.

[37] In any event, assistance provided on a purchase of services basis could not be considered as "aid paid" by the state within the meaning of section 402(a)(23) of the Social Security Act (42 U.S.C. \$ 602(a)(23)) in determining whether New York is in compliance with federal standards. Under the AFDC program "aid to families with dependent children means money payments with respect to . . . a dependent child or dependent children." 42 U.S.C. \$ 606 (b) (emphasis supplied). Purchases of services with direct payment to vendors, does not comply with the federal requirements and with HEW regulations designed to protect the "amounts of aid paid" under the AFDC program. See HEW Handbook of Public Assistance, Part IV, Section 5120 et seg.: 45 C.F.R. 233.20 (a) (ii), 34 Fed. Reg. 1394 (1969). A state apparently may not claim federal reimbursement for the provision by vendor payments or purchase of service of "subsistence and other assistance items" normally included in a standard of need unless the federal statute and regulations specifically so provide. See 42 U.S.C. § 602 (a) (13) and (14); 45 C.F.R. Parts 220 and 226, 34 Fed. Reg. 1243, 1354 (1969) (child welfare, family planning and other family services may be purchased; other services must be provided by the agency itself).

[38] The requirement that payments be in cash gives recognition to the right to freedom of choice and to self-respect by the recipient of welfare. Thus, the interpretation of section 406(b) of the Act (42 U.S.C. § 406(b)) in the HEW Handbook reads as follows:

The provision that assistance shall be in the form of money payments is one of the several provisions in the act designed to carry out the basic principle that assistance comes to needy persons as a right. The right carries with it the individual's freedom to manage his affairs; to decide what use of his assistance check will best serve his interests; and to make his purchases through the normal channels of exchange. enjoying the same rights and discharging the same responsibilities as do friends, neighbors, and other members of the community. The Social Security Administration's interpretation of "money payments" recognizes that a recipient of assistance does because he is in need, lose his capacity to select how. not, because he is in need, lose his capacity to select how, when, and whether each of his needs is to be met.

B. Legislative History of Section 131-a

Motive and purpose of the legislature may be considered in determining what it in fact did. Cf. Williams v. Danridge,

F. Supp. (D. Md. 1969) (maximum grant regulation motivated by "an inadequate State appropriation"). An examination of the legislative history of section 131-a, read together with the state budget, casts considerable doubt upon the defendants' contention that the new schedules were designed wholly, or even primarily, to meet the demands of efficiency.

[39] The proposal to convert to a flat grant system was initiated by the New York State Board of Social Welfare. In its report to the Governor in May, 1968, it recommended flat grants "based on family size and the age of the oldest child" to "include food, clothing, personal incidentals, household supplies, school expenses" and the like, with "additional money amounts" in certain circumstances such as special diets or moving expenses, which are not

common to all recipients." Challenge and Response, 4 (May 1968).

This proposed change was not designed to reduce standards of need or payments. In a letter of Commissioner Wyman to the Governor's Counsel dated September 13, 1968, the flat grant system was spelled out in great detail. The schedules included were those in present section 131, not the reduced schedules in section 131-a. Moreover, many special grants such as those for special clothing and for diet supplements for pregnant women and medical patients were provided. And there was a provision for annual repricing of schedules "whenever the repricing shows an increase or decrease of 2% or more."

This proposal was never introduced in bill form; in its stead, section 131-a was substituted. The reason for this change is revealed by an examination of the labyrinth process leading to the adoption of the 1969-70 state budget.

[40] The Governor's proposed budget, dated January 21, 1969, did not indicate any plan for a shift in methods of computing standards of need. See Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, 566-67, 571-72, 778-780. AFDC payments were expected to continue "to increase principally because of the increasing cost of living and a continued demand by public assistance recipients for the granting of special need items in addition to the basic subsistence allowances." Id. at 779. The percentage of federal aid was expected to decline because of a "freeze" on the number of children to be aided and restricted participation in cases of aid due to unemployment of a parent. Ibid. Based upon monthly AFDC averages, the projected number of recipients for 1968-69 was 917,-235 and for 1969-70 it was 1,095,704. The average budgeted monthly grant was \$74.57 for 1968-69 and \$83.37 for 1969-70. Id. at 779. The total 1969-70 to AFDC program cost was projected at \$1,096,172,000; \$440,195,000 was anticipated in federal aid. Id. at 778. The estimated cost-of-living increase for 1969-70, based upon the system then in effect, was \$5,000,000 and this sum was apparently

included in the \$1,096,172,000 figure. Since the share of the state and of local social service districts is almost equal (id. at 778, \$321,125,000 was budgeted for 1969-70 as the state's share of the 1969-70 AFDC [41] program. The total Local Assistance Fund for State Aid Programs for the Department of Social Services was budgeted at \$1,040,514,000-1d. at 786. See also Sen. 1689, Ass. 2305 (1969).

Because "necessary expenditures are expected to outstrip available funds," the Governor reported, "a reduction in the level of recommended budget expenditures by approximately 5 per cent across-the-board may be required." Executive Budget for the Fiscal Year April 1, 1969 to March 31, 1970, M7. The Local Assistance Fund, including AFDC contributions by the state, was to be "limited to 95 per cent of the amount of expenditures otherwise estimated ... to keep expenditures within available income." Id. at 739. This would have reduced the category of state aid to AFDC by approximately \$16,000,000 and all programs of state social service local aid would have been reduced by \$52,000,000 to \$988,000,000.

It is not clear from the Governor's proposals whether the total AFDC program cost was intended to be reduced 5% from \$1,096,172,000, for a cut of approximately \$55,000,000, or whether the local social service districts were expected to increase their share, leaving the total program cost unchanged. In any event, no one suggested that the 5% cut was anything but a money saving device.

[42] During the legislative session the Governor's proposed budget was modified to provide greater aid than the Governor had requested for some items but to reduce the state AFDC appropriation even further. The budget bills do not show the detailed amounts for each category of local aid but show a lump sum for all categorical assistance. Instead of \$988,000,000 proposed by the Governor (after his 5% cut), \$913,000,000 was appropriated. Sen. 1689-A, Ass. 2305-A (adopted March 29, 1969, ch. 49, L. 1969). This constituted a reduction of approximately 12% from the original projected cost. We are informed that depart-

mental computations indicate that \$297,441,000 was the amount intended for the AFDC program, a saving of \$23,684,000 or about 7% over the Governor's Budget. When the \$5,000,000 amount in the Governor's Budget for 1969 cost-of-living increases is eliminated the reduction is \$18,684,000, or about 6%. Since the state's share is some 34%, the decrease in total AFDC payments under the program seems to have been at least some \$50,000,000.

A further reduction of \$42,000,000 was made by the supplemental budget, making the total reduction in local aid for categorical assistance some 16% from what the Governor's Budget had estimated as projected costs. Sen. [43] 5692, Ass. 7205 (adopted May 2, 1969, ch. 340, L. 1969). Defendants have indicated, in a letter to the Court dated May 14, 1969, that the \$42,000,000 cut in the Supplemental Budget was taken "from the \$297,441,000 figure" for local AFDC aid. We are told by the State that this reduction was made in contemplation of increased federal aid and that if this sum is not supplied by the federal government "the 1970 Legislature would be requested to cover the amount in a supplementary budget."

Timing of legislative action shows the close relation between the new AFDC program and budgetary decisions. Section 131-a was not introduced until February 18, 1969 in the Assembly (Ass. 6620) and March 27, 1969 in the Senate (Sen. 5419), some time after the Governor's Budget Message was delivered on January 21, 1969. The amendment was adopted on March 29, 1969, the same day as the budget. There is good reason to believe, when the budget is read with section 131-a, that a cut in the projected cost of the total AFDC program as well as in the state contribution was intended.

Since a reduction of levels of payments, based on projections, was likely to be required to achieve these budgetary reductions, since all affidavits and testimony indicate that payments have not been above the standard of need, and since New York continues to purport to pay [44] at 100%

of standard of need under section 131-a, there is strong support for the contention that standards of need and levels of payments were reduced.

This Court is not, of course, concerned with justifications for state budgetary decisions, nor does it sit to discourage desirable improvement in the efficiency of state welfare programs. The issue before us is whether the system of reducing standards of need and levels of payment embodied in section 131-a violates federal statutes. We turn now to the relevant federal provision for an answer to that question.

VI. FEDERAL LIMITATIONS ON REDUCTIONS IN AID TO DEPENDENT CHILDREN

A. Purpose

Paragraph 23 of subdivision (a) of section 402 of the Social Security Act of 1935, as amended (42 U.S.C. § 602 (a) (23), requires that each state's AFDC plan must:

provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

This provision was effective January 2, 1968. Pub. L. 90-248 Title II, § 202(b), 81 Stat. 821.

Defendants contend that 402(a)(23) should be [45] narrowly construed. They interpret it as being primarily aimed raising a state's standards of need and as not controlling a state's levels of benefits to AFDC recipients. In support of this construction of the statute, defendants rely upon the position of HEW as expressed in its amicus brief filed in Lampton v. Bonin, ___ F. Supp. ___ (E.D. La. 1969) and the implementing regulation of HEW which would permit a state to make downward adjustments in the amount of AFDC payments through the device of "ratable reductions"—i.e., percentage reductions applied to the standard of need. 45 C.F.R. § 233.20(a) (2)(ii), 34 Fed. Reg.

1394 (1969). We disagree and hold that a broader construction of 402(a)(23) is required by the language, statutory history and good sense.

Section 402(a)(23) plainly states that both the "amounts used by the State to determine the needs of individuals"i.e. the standard of need-and "any maximums that the State imposes on the amount of aid paid to families"-i.e. the level of benefits-be adjusted "to reflect fully changes in living costs since such amounts were established." The adjustment contemplated by 402(a)(23) is undoubtedly an upward one in view of the inflationary trend this country has experienced over the last two decades. The one judge who has heretofore considered this question [46] at length has reached a similar conclusion. Lampton v. Bonin. F. Supp. (E.D. La. 1969) (dissent, setting out legislative history at length; the majority did not reach the question) ("Congress' intention to compel the states to raise ADC payments"). See also Dandridge v. Williams. F. Supp. ____, ___ (D. Md. 1969) ("designed to increase benefits to keep pace with living costs").

This federal provision grew out of an attempt to reform the inequitable and unsatisfactory aspects of our present welfare system resulting from the inadequate and widely varying level of grants among the states. The solution first proposed by HEW would have required all states to meet in full their own need standards and to adjust payments annually so as to maintain payments at the 100% level despite intervening inflationary price rises. Congress put off enacting any basic change to allow further study and consideration of alternatives. At the same time, it did take an interim step, a holding action against further deterioration in levels of benefits.

Section 402(a) (23) embodies that interim and temporary solution. It creates a floor under present levels of benefits by prohibiting future cuts in welfare payments and by requiring that all states provide at least [47] one increase by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

As already noted, section 402(a) (23) grew out of an Administration proposal to require all states to pay 100% of need and to make annual cost-of-living adjustments beginning July 1, 1969. This proposal was originally embodied in the bill to amend the Social Security Act introduced in the House in 1967 at the request of the Administration. Section 202 of H.R. 5710, 90th Cong., 1st Sess. The bill ultimately reported out by the House Ways and Means Committee and passed by the House, H.R. 12080, contained no such provision.

The Administration renewed its request in the hearings before the Senate Finance Committee and proposed the following amendment to the House Bill:

[each state plan must] provide (A) effective July 1, 1969, for meeting . . . all the need, as determined in accordance with standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children . . . and (B), effective July 1, 1969, for an annual review of such standards and . . . for updating such standards to take into account changes in living costs. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 635.

See also Id. at 716 (statement of HEW on its proposed amendments to H.R. 12080).

[48] Secretary of Health, Education and Welfare John W. Gardner, in his testimony before the Committee in support of this amendment, specifically referred to the need to increase the level of benefits:

The House bill does nothing to improve the level of State public assistance payments. As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility—but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many states. . . .

We strongly urge you to adopt the administration's proposal requiring states to meet need in full as they determine it in their own State assistance standards, and to update these standards periodically to keep pace with changes in the cost of living. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 216.

Similar testimony was given by Undersecretary Wilbur Cohen:

It is this serious discrepancy between what the States themselves determine to be minimal need and the amounts they will actually pay that has led us to strongly recommend that States be required to meet needs in full as they determine them. . . .

But it is not enough only to require the States to meet need standards. They must assure that these standards reflect current prices. Hearings Before the Committee on Finance, U.S. Senate, 90th Cong., 1st Sess., on H.R. 12080 at 259.

[49] While Messrs Gardner and Cohen referred only to state dollar maximums in the illustrations used in their testimony (id. at 255-260), it was clear from their statements and colloquy with those Senators present that concern was being expressed about any method used by the states to pay less than was indicated by their standards of need. Part of the record reads as follows:

SENATOR RIBICOFF: What happens, Mr. Cohen, with the people who receive payments so far below the standard?

MR. COHEN: Well, if a State does not pay its full standard, two things can happen. One is, as Senator Long indicated, that they may make up the difference from income from social security or earnings so that they still might meet the standard in those cases where an individual has social security or could work. But, I might say that out of the 2 million people who are old-age assistance recipients, the average age being 75, quite a number of them can-

not work, although half of them do have social security beneifits.

SENATOR RIBICOFF: I know, but you take all that into account in the standards that are being set. What they are receiving is not just a question of the amount they receive from the welfare agencies. You take into account all they receive. What happens to the child or the adult who receives so much less than what you consider or is considered a proper standard? How do they live?

SECRETARY GARDNER: It shows up most amount.

SENATOR RIBICOFF: How do they live?

MR. COHEN: They have to cut back on their food and clothing and other needs to live on the amount that the State gives them.

[50] SENATOR RIBICOFF: Well, is not a study made or do not you know what happens to these people? I mean just what is happening to them?

MR. COHEN: Well, I think that the evidence shows—I do not have it immediately before me—that many of these children and these families grow up without adequate food, without adequate medical care, and certainly their whole aspirations for improving their educational status are stunted, and I think that the evidence from the State administrators when you hear them will bear that conclusion out.

SECRETARY GARDNER: It shows up most clearly, I think, in the medical data. You will find a higher incidence of just about every kind of medical disorder and physical handicap in these young-sters—malnutrition and everything else.

SENATOR RIBICOFF: Well, in looking to the cost to society ultimately, the people who are below standard cause a greater drain eventually upon what the society has to pay out in every conceivable way, is that not right?

SECRETARY GARDNER: No question about that, Senator.

MR. COHEN: I might add, Senator, just to give you a figure which I will come to later, that the average payment per child for the Nation as a whole is around \$36 per month per child. That is the actual payment, which is a little bit more than \$1 per day per child.

Now, I think, that this is an indication of the rather low level and inadequacy of payments that exist in the country as a whole. Some are higher and some are notably and substantially lower.

Id. at 258-59.

The bill reported out of the Senate Finance Committee, and passed by the Senate, reflected a compromise on this issue. The requirement that all states pay full need [51] was rejected, but the second recommendation—that they be required to annually increase levels of payments to reflect changes in living costs—was contained in the Senate version. The bill is practically identical to 402(a) (23) except for a mandated annual cost-of-living adjustment:

by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid to families will have been proportionately adjusted.

See also Senate Report No. 744, 1967 U.S. Code Cong. & Admin. News 3133.

In the House-Senate Conference Committee, the requirement for annual increases was dropped; only one adjustment prior to July 1, 1969 was to be required. The Conference Committee Report explains:

The new section [Senate amendment] also amended section 402(a) of the Act to require that by July 1, 1969, and annually thereafter, each State . . . must adjust its standards so as to reflect current living

costs and make proportionate adjustments in any

Under the [Conference Committee] agreement, the new section 402(a) provision (for adjustments to reflect living costs) would require States to make only one adjustment before July 1, 1969.... Conference Committee Report No. 1030, 1967 U.S. Code Cong. & Admin. News 3209.

[52] The language of the basic requirements of 402(a) (23) remained virtually unchanged throughout its legislative evolution. There is no hint from either committee that it intended to change the purpose of the section as expressed by Administration spokesmen. Hence, there is no reason to believe that Congress failed to appreciate the import and plain meaning of the language in 402(a) (23).

B. Requirements of section 402(a) (23)

1. Adjustment of Standards of Need

Section 402(a)(23) simply requires that all states increase benefits once to keep pace with living costs. The only significant variation in the change required in different states is the percentage adjustment required, which depends on when prior to January 2, 1968—the date 402(a) (23) became law—a state had last repriced its need standards. The more outdated the prices used to determine need, the greater the required adjustment.

All items comprising standards of need must be repriced. While items need not be added, no item previously included and still required by recipients may be omitted, else the effect of repricing would be nullified. The content of the repriced standards must be equivalent to that of the old. Any consolidation through a combining of items "may not result in a reduction in the amount of the standard." 45 C.F.R. § 233.20(a) (2) (ii), 34 Fed. Reg. 1394 (1969).

[53] 2. Increase in Levels of Benefits

Section 402(a) (23) by its terms requires every state to increase its levels of payments by an amount sufficient to offset the rise in the cost of living. An upward adjustment of "any maximums that the State imposes on the amount of aid paid" automatically necessitates an increment in the amount of such aid.

Defendants contend that this requirement of increased levels of benefits does not apply to states such as New year, which have been paying full need or to states which employ percentage reduction systems. "Maximums," according to defendants, is a word of art in welfare law jargon which refers solely to dollar maximums and should be so construed within the meaning of the statute.

This argument is not persuasive. Section 402(a) (23) speaks of "any maximum," not just dollar maximums. If a state pays 100% of need, a standard of need constitutes both the maximum and the amount of aid paid. Repricing the standard of need serves, without more, to increase the level of payments. Both the creation and the reduction of dollar maximums are equal evasions of the statute.

The invalidity of this leg of defendant's argument can be illustrated by a hypothetical. The standards of need in State X and State Y are \$200 per month. State X pays full [54] need, or \$200, while State Y imposes a dollar maximum of \$100. The cost of living has risen 10% in both states. Under defendants' interpretation of 402(a) (23), State Y would have to increase its monthly payments to \$110, while State X could lawfully reduce them to \$100, or even \$50.

Section 402(a) (23) applies in the same manner to a percentage reduction system. The maximum which must be proportionately adjusted is not, as defendants would have us believe, the number representing the percentage reduction but, rather, the dollar figure resulting from the application of the percentage to a family's need as determined by the state's standard of need.

For example, if a state had a standard of need of \$100, and paid 80% of need, the recipient would receive \$80. If the need standard were now raised to \$120 to reflect a rise in living costs, and the state continued to pay 80%, the recipient would receive \$96. The rise in living costs would thus be reflected in increased aid to the recipient.

We do not decide whether section 402(a) (23) precludes a state from converting to a "flat grant system" by averaging out all the special grants across the state and then adding this figure to that of the basic recurring grant, or by including all items previously covered by special grants as part of the regular grant, or by some other technique. Nor [55] do we decide whether any flat grant system discriminating against large families or families with older children would be invalid. But cf. Westberry v. Fisher. F. Supp. , __ (D. Me. 1969) (state regulation invalid if "families with a large number of dependent children receive less favorable treatment under Maine's AFDC program than families with a small number of dependent children"). All we need now decide is that section 402(a) (23) precludes a state from making changes resulting in either reduced standards of need or levels of payment. Cf. 45 C.F.R. § 233.20 (a) (2) (ii), 34 Fed. Reg. 1394 (1969) (consolidation of the standard of need "may not result in a reduction in the content of the standard").

C. HEW Implementing Regulation

"The interpretation . . . by those charged with its administration must be given great weight by courts faced with the task of construing the statute." Zemel v. Rusk, 381 U.S. 1, 11 (1965). But an administrative interpretation is by no means decisive when it departs from the meaning of the language and purpose of the statute; "deference" is all that is required. Udall v. Tallman, 380 U.S. 1, 16 (1965); United States v. American Trucking Assn's, Inc., 330 U.S. 534, 543 (1940); Hagar Co. v. Helvering, 308 U.S. 389, 394 (1940). See cases collected in Williams v. Dandridge, [56] ___ F. Supp. ___, ___ (D. Md. 1969) (supplemental

opinion). Any HEW regulation or interpretation "inconsistent with the controlling federal statute" may not be relied upon to justify denial of AFDC benefits. King v. Smith, 392 U.S. 309, 333, n. 34, 88 S. Ct. 2128, 2141, n. 34 (1968); Williams v. Dandridge, ___ F. Supp. ___, __ (D. Md. 1969) (supplemental opinion).

HEW agrees that the pricing of the need standard must be updated and that maximums must be appropriately adjusted. However, if a state has insufficient funds to meet need in full under the adjusted standard, HEW would permit it to pay to recipients only a given percentage of the adjusted standard of need. Its regulation provides that a state AFDC plan must:

> provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph [adjustments must be uniform statewide]. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards. 45 C.F.R. § 233.20 (a) (2) (ii), 34 Fed. Reg. 1394 (1969) (emphasis supplied).

[57] Defendants do not contend that section 131-a establishes any ratable percentage reductions of grants applied to the standard of need. "Section 131-a," they insist, "provides for the full standard of need." Memorandum of Law in Support of Defendants' Motion for Summary Judgment, p. 22. New York will continue to purport to pay on the basis of 100% of its standard of need. *Id.* at 23. The valid-

ity of the escape route for section 402(a) (23) supplied by the regulation is thus not formally before the Court.

Nevertheless, since this regulation provides the underlying foundation for defendants' position and since the underscored portion of it cannot stand in the face of our interpretation of 402(a)(23), we feel obligated to briefly consider the regulation's validity. Were HEW correct in its assertion that 402(a) (23) can be easily circumvented by a mere technical adjustment of theory and figures and that it does not impair a state's freedom to set any the factorization in the state's statutes—we would be reluctant to some consider invalidating section 131-a. We are, after all, not playing a legislative word game but dealing with the allocation of tens of millions of dollars in tax receipts and with the well-being of a million New York citizens.

[58] Our analysis of the plain meaning of section 402(a) (23) and its legislative history and our construction of "maximums" within the meaning of the statute are equally relevant here and need not be repeated. Only three additional points need be made.

First, it seems an exercise in sophistry to infer, as does HEW, that states are free to do what they will with percentage reductions since 402(a) (23) does not specifically refer to them and the pecentage figure itself need not be increased. See Lampton v. Bonin, ___ F. Supp. ____ (E.D. La. 1969) (dissent; majority did not reach issue). As noted above, the number representing the percentage reduction is not the maximum to be "proportionately adjusted." Moreover, since the level of payments is automatically adjusted so long as the standard of need is updated and the percentage is kept constant, Congress' failure to mention percentage reductions is easily explainable by the fact that "there simply was no need to in order to achieve the desired results." Id. at ___.

Second, to permit ratable reductions in the manner suggested by HEW would nullify the Congressional intent to increase the level of benefits and would render the statute virtually meaningless. A state could avoid increasing payments by merely lowering the percentage figure or, if it [59] had not been a percentage reduction state, by adopting a percentage system. Compliance with 402(a) (23) could be secured by a mere administrative adjustment of numbers without effecting any substantive change. States would be able to set any levels of payments—the identical position they were in prior to the enactment of 402(a) (23). This is highlighted by the very example put forth by HEW to illustrate its position:

The fact that section 402(a) (23) does not affect percentage reductions allows States to retain considerable flexibility as to the amount of their assistance payments. We return to our example where a State with a need standard of \$100 paid 80% of need and the recipients received \$80. Because of a 20% rise in living costs, the State's need standard is raised to \$120. Such a State could now pay 66-2/3% of need, and the recipients would still receive \$80. Or the State could pay 100% of need, or 80%, or 50%, according to the available funds. States which formerly paid 100% of need might now change and pay a lesser percentage. States with a system of maximums might in addition compute payments on the basis of a percentage of need. HEW Amicus Brief submitted in Lampton v. Bonin, at page 10 (emphasis supplied).

"Nullification" rather than "flexibility" is a more apt word for such an interpretation.

Finally, were HEW correct, not only will assistance not be increased as Congress intended, but the implementing regulation, by encouraging states to switch to percentage reduction systems, is likely to lead to lower payments to present welfare recipients. The net result, under a percentage reduction system, of raising the standard of need without a concomitant increase in available funds, is to increase the number of persons eligible for relief at the expense of those already on relief. It is inconceivable that Congress intended the most poverty stricken members in our society to pay the added cost of those newly added to the AFDC rolls.

VII. CONCLUSION

As a participant in the AFDC program, New York may not breach "its federally imposed obligation to furnish 'aid to families with dependent children * * * with reasonable promptness to all eligible individuals * * * ." King v. Smith, 392 U.S. 309, 333 (1968). The state's plan "must conform with several requirements of the Social Security Act." Id. at 317. One of the federally imposed conditions -resulting from enactment of section 402(a) (23)-is that participating states not reduce either standards of need or levels of benefits below those in force on January 2, 1968 as revised to reflect cost-of-living increases between that date and July 1, 1969. Any "state law or regulation inconsistent with such federal terms and conditions is to [61] that extent invalid." Id. at 333, n. 34; Solman v. Shapiro, F. Supp. (D. Conn. 1969); Westberry v. Fisher, F. Supp. ___ (D. Me. 1969) (invalidity of maximum grant regulations); Dews v. Henry, ___ F. Supp. ___ (D. Ariz. 1969); Williams v. Dandridge, __ F. Supp. __ (D. Md. 1968).

We do not hold that New York "must appropriate additional funds to support its participation" in the AFDC program. Williams v. Dandridge, ___ F. Supp. ___ (D. Md. 1968). We hold only that if it participates it must comply with federal law.

There is a substantial possibility that section 131-a of the New York Social Services Law does reduce both the standards of need and levels of benefits in violation of federal law. If this section is declared to be invalid and irreverseible steps to implement section 131-a have been taken or changes on actual payments pursuant to section 131-a have been made, irreparable harm to recipients of AFDC will

result. On balance, the probability of harm to plaintiffs from a failure to grant a preliminary injunction far outweighs possible harm to the state in granting one. Accordingly, the parties will submit proposed orders for a preliminary injunction by 4:30 p.m. on Friday, May 16, 1969. The attorneys for the parties should be present in chambers at that [62] time so that arrangements for further proceedings can be made.

VIII. SOME QUESTIONS OF FACT

In preparation for the meeting in chambers, attorneys should consider the questions of fact listed below and be prepared to raise any additional issues they desire the Court to consider.

- 1. What is the total average grant (recurring and special) per family of each size?
 - (a) New York City
 - (b) New York State outside of New York City
 - (c) New York State as a unit
- 2. What is the average amount that a family of each size receives in special grants?
 - (a) New York City
 - (b) New York State outside of New York City
 - (c) New York State as a unit
- 3. What is the number of families of each size receiving AFDC assistance?
 - (a) New York City
 - (b) New York State outside of New York City
 - (c) New York State as a unit
- 4. What is the number of families of each size with an oldest child above the mean for that size family?
 - (a) New York City
 - [63] (b) New York State outside of New York City
 - (c) New York State as a unit

- 5. The same question as (4) as regards families of each size with a child below the mean age.
- 6. What is the total number of families receiving increased grants under section 131-a (taking into account cyclical and special grants available under present law)? What is the total dollar amount of the increases? What is the average increase per family (broken down into families of each size)?
 - (a) New York City
 - (b) New York State outside of New York City
 - (c) New York State as a unit
 - 7. The same question as (6) as regards decreases.
- 8. Is it contemplated that any persons presently eligible as an AFDC recipient will be declared ineligible for such aid under section 131-a?
- 9. Why do the levels of payments in section 131-a increase by the same amount as the size of the family increases?
- 10. What is the number of AFDC recipients in each of the counties comprising the present SA-1 schedule other than the five New York City counties?
- 11. What effect will the new Food Stamp program have on AFDC recipients? Who will be eligible? Will it be applicable [64] throughout New York State? When will this information be available?
- 12. The same question as (11) as regards the Day Care Center program.
- 13. What other programs, if any, are to be initiated or expanded to meed AFDC needs? When?
- 14. What amounts were appropriated in the budget passed March 29, 1969 for each of the forms of categorical aid?
- 15. What amounts were appropriated in the Supplemental Budget passed May 2, 1969 for each of the forms of categorical aid?

- 16. How were the figures referred to in questions (14) and (15) determined, *i.e.*, what statistical bases were employed in reaching the final dollar amounts in each of these categories?
- 17. What were the total dollar amounts appropriated in the 1968-69 fiscal year for AFDC in (a) the Local Assistance Fund Budget adopted in 1968, and (b) all deficiency budgets adopted in the 1968-69 fiscal year?
- 18. Does the difference in \$23,684,000 between the proposed budget and the budget actually adopted as regards the AFDC appropriation represent administrative savings or partial savings from the abolition of special grants? What figures were used to answer this question?
- [65] 19. Has there been any further correspondence between the state and HEW regarding the AFDC program?

[66] [SUMMARY JUDGMENT] June 18, 1969

In this Court's opinion granting plaintiffs' motion for a preliminary injunction, we held that section 402(a) (23) accomplishes two results. First, it creates a floor under present levels of benefits in AFDC by prohibiting cuts in welfare payments. Second, it requires that all states provide at least one increase in both standards of need and levels of benefits by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

There is "no genuine issue as to any material fact" on the question whether section 131-a of New York's Social Services Law meets this dual requirement. The statistical data supplied by both defendants and plaintiffs, while differing in some particulars, is consistent so far as it is legally relevant.

The change to the flat grant system—long favored by some as a more enlightened method of public assistance—

has been used as a subterfuge to enact drastic cuts in both standards of need and levels of benefits to meet the exigencies of a state budget in violation of the Congressional mandate embodied in section 402(a) (23). Accordingly, plaintiffs' motion for summary judgment must be granted.

- [67] Set out below are the Court's findings of fact and conclusions of law:
- 1. The schedules contained in section 131-a effect a substantial reduction in standards of need and levels of benefits.

The estimates submitted by the state are that 111,899 welfare families will receive increases in benefits under section 131-a; that the total monthly amount of these increases is \$1,716,910; and that the average monthly amount of the increase per family is \$15.34. The decreases under section 131-a are greater in all respects: 141,313 families will receive decreases; the total monthly amount of these decreases is \$3,420,441; and the average monthly decrease is \$24.20. These figures are set out in the table below:

	Number of Families	Total Monthly Amount	Monthly Average Change	
Increases 111,899		\$1,716,910	\$15.34	
Decreases	141,313	\$3,420,441	\$24.20	

These statistics reflect only the changes in the regular recurring grant plus, for New York City only, the amount of the cyclical grant. They do not include the loss to dependent children of all the special grants—available under present law because they have heretofore been deemed by the state as essential to children's welfare; these special [68] grants are abolished under section 131-a to achieve a further reduction in state expenditures of many millions of dollars.

Approximately 80% of the AFDC recipients in the state reside in New York City. The figures for New York City are set out below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	79,838	\$1,091,471	\$13.67
Decreases	110,908	\$2,772,313	\$25.00

Plaintiffs have submitted statistics which attempt to compute the effect of eliminating non-recurring special grants for New York City residents. With this new variable included the number of families receiving increases in New York City under section 131-a drops to a mere 245 and the total monthly amount of these increases is \$530 for all of New York City. Only a very rare class of New York City families—those with six or seven children, the oldest of whom was five years of age—would receive any increase at all. Conversely, the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amount of their decreases totals approximately \$5,950,000 per month.

[69] Set out below is a table comparing the total average grant (recurring and special) per family in New York City under present law and under the section 131-a schedule:

Family size	Present Law	Section 131-a
2	\$137.42	\$116
3	\$197.13	\$162
4	\$250.84	\$208
5	\$315.55	\$254
6	\$352.26	\$297
7	\$418.97	\$340
8	\$463.68	\$383
9	\$505.39	\$426
10	\$571.10	\$469

- 2. The elimination of special grants constitutes a reduction of standards of need and levels of benefits.
- 3. The elimination of the cyclical grant for New York City residents constitutes a reduction of standards of need and levels of benefits.

- 4. The elimination of differentiated larger grants for the needs of families with older children and the failure to provide for families with children above the mean age of the oldest child in families of a given size constitutes a reduction of standards of need and levels of benefits.
- 5. The transfer of seven counties which are presently included in the SA-1 schedule to a lower schedule constitutes a reduction of standards of need and levels of benefits for AFDC recipients of these counties. The small upward adjustment of the schedules of payments in some counties outside New York City promulgated administratively pursuant to the amendment to section 131-a discussed in the per curiam opinion of the three-judge court, Rosado v. Wyman, ___ F. Supp. ___ (E.D.N.Y. 1969), does not offset the reductions; the new schedules constitute a reduction in current standards of need and levels of benefits.
 - Some persons who presently receive supplementary AFDC benefits will no longer be eligible for assistance under section 131-a.
 - New public assistance programs instituted by New York State will not offset the reductions effected by section 131-a.
 - (a) Food Stamp Program. The Food Stamp Act provides that participating states shall not decrease welfare payments as a result of participation in this program. 7 U.S.C. § 2019(d). The state concedes that "Neither the donated commodities or food stamps may be deemed or construed to be public assistance in whole or in part or a substitute therefor. Participation in either program by recipients or others is completely voluntary."

In any event, federal funding is not yet certain and in many instances all that will be involved is a change from the Commodity Distribution Program. No [71] projected food stamp program can offset the reductions in benefits described above.

(b) Day Care Center Program. This program involves only a handful of recipients. It cannot serve as a sub-

stitute for AFDC payments, and it will be some time before the program is significantly expanded. No projected day care center program can offset the reductions in benefits described above.

- (c) Other Programs. Such programs as the Work Incentive Program are of minor significance and have little effect on the issues before us. Neither this program nor any other projected program nor any combination of such programs can offset the reduction in benefits described above.
- 8. The Governor's 1969-70 Proposed Budget contained an AFDC appropriation request of \$321,125,000 as a part of a total Local Assistance Fund request of \$1,040,014,000. In the March 29, 1969 budget bill, the legislature appropriated only \$912,014,000 to the Local Assistance Fund—a reduction of \$128,000,000. Of this sum, \$290,459,000 was earmarked for AFDC—a reduction of approximately \$30,000,000 or 10%. When the \$5,000,000 amount in the Governor's Proposed Budget for 1969 cost-of-living increases is eliminated, the reduction for AFDC is [72] approximately \$25,000,000. Since the state's share is approximately \$25,000,000. Since the state's share is approximately 30%, the decrease in total AFDC payments under the New York State program is no less than \$75,000,000.

Defendants state that the \$25,000,000 reduction in the state's share of AFDC costs "is the result of the allowance schedules in Section 131-a including the elimination of special grants, the revision of Section 139-a, addition of Section 132-a and any other changes made by Chapter 184, Laws of 1969." However, no substantial portion of the savings could have been expected to result from changes in the welfare law other than section 131-a. The \$25,000,000 reduction represents almost entirely savings in AFDC grants.

19. The additional \$42,000,000 reduction in the AFDC appropriation contained in the May 2, 1969 Supplemental

Budget was enacted in contemplation of increased federal funds and will not affect AFDC payments.

Plaintiffs' motion for summary judgment is granted.

/s/ Jack B. Weinstein U.S.D.J.

BB. Order by Judge Weinstein Granting Permanent Injunction (Document No. 79)

IN THE UNITED STATES EASTERN DISTRICT OF NEW YORK

JULIO ROSADO, et al.,

Plaintiffs

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69 Civ. 355

GEORGE K. WYMAN, et al.,

ORDER

Defendants

Upon finding invalid the system of "maximum monthly grants" and schedules of need prescribed in New York Social Services Law § 131-a, Laws Ch. 411, May 9, 1969, as amended, March 31, 1969, it is:

ORDERED, ADJUDGED AND DECREED that:

- 1. Defendant Wyman, his successors in office, agents and employees and all persons in active concert and participation with them, including local social services officials administering the Aid to Families with Dependent Children program under state supervision, are hereby enjoined from implementing or utilizing said Section 131-a and, pursuant thereto, from denying, reducing or discontinuing any benefits in the form of either regular recurring grants or special grants now available to recipients of Aid to Families with Dependent Children in New York (including the quarterly "flat grant" in New York City and special grants throughout the State).
 - 2. This order shall take effect immediately.

Dated: Brooklyn, New York June 18, 1969

./s/ Jack B. Weinstein U.S.D.J.

This order is stayed until 4:00 P.M. on June 19, 1969. So ordered.

Jack B. Weinstein

- CC. Opinion of United States Court of Appeals for the Second Circuit Vacating Preliminary and Permanent Injunctions, Reversing Summary Judgment and Affirming Dissolution of Three Judge Court (Document Nos. 65, 66, 67 [Court of Appeals])
- (1) Appeals from an order and a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, F. Supp. (1969) and F. Supp. (1969), granting a preliminary injunction and a permanent injunction against enforcement of Section 131-a of the New York Social Services Law, Law of March 30, 1969, ch. 184, \$5 [1969 McKinney's Session Laws of New York 215, 217], and granting summary judgment for plaintiffs-appellees. (2) Appeal from an order of a three-judge court of the Eastern District of New York, dissolving itself on the ground that the issue for which it was established was moot and that it had before it no new issue then ripe for adjudication.
- (1) The injunctions are vacated; the decision granting summary judgment is reversed. (2) The order of the three-judge court is affirmed.

Hays, Circuit Judge:

Defendants-appellants, the New York Commissioner of Social Services and the New York Department of Social Services appeal from an order and a judgment of the United States District Court for the Eastern District of New York granting a preliminary injunction, —— F. Supp. —— (1969), and a permanent injunction, —— F. Supp. —— (1969), against enforcement of Section 131-a of the New York Social Services Law.

¹ Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217].

Subsections 1-3 of Section 131-a provide:

¹³¹⁻a. Maximum monthly grants and allowances of public assistance

^{1.} Any inconsistent provision of this chapter or other law notwith-standing, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York: (continued on following page)

An appeal by plaintiffs-appellees from a related decision of a three-judge court has been consolidated with the appeals referred to in the preceding paragraph.

I.

Plaintiffs-appellees in this class action are welfare recipients residing in New York City and in Nassau County. They receive payments pursuant to the Aid to Families with Dependent Children program (AFDC) of the Social Security Act, 42 U.S.C. §§601-10 (1964, Supp. IV 1965-68). Under this program, in which all states participate, the federal government provides funds to the states on the condition that the plans for use of the funds meet various federal requirements. 42 U.S.C. §602(a) and (b) (1964, Supp. IV 1965-68). The states and their subdivisions also provide funds and each state administers its own program.

Appellees raised two principal claims in their complaint. The first was that Section 131-a violated Section 602(a)(23) of the Social Security Act² as amended in 1967 by reducing the amount of the AFDC benefits paid to them. The sec-

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
One	TWO					8940
\$70	\$116	\$162	\$208	\$254	\$297	\$240

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

 The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
One	TWO	1			-057	*000
\$60	\$101	\$142	\$183	\$224	\$201	\$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

Social Security Amendments of 1967, Pub. L. No. 90-248, §213(b), 81 Stat. 821, 898 (codified in 42 U.S.C. §602(a)(23) (Supp. IV 1965-68)).

ond claim, made by those appellees who are residents of Nassau County, was that Section 131-a violated the equal protection clause of the Fourteenth Amendment by providing for lower payments to AFDC recipients in Nassau County than to those in New York City, although the cost of living is substantially the same in both areas.

A three-judge district court was constituted under 28 U.S.C. §2281 (1964) to hear the constitutional claim.

While the action was pending before the three-judge court, Section 131-a was amended to permit the Commissioner of Social Services to increase scheduled payments for areas outside New York City up to a maximum no higher than the levels for New York City, upon his determination that the total cost of the items included in the schedule for such an area exceeds the amount provided in the schedule.3 The three-judge court ruled that this amendment mooted the equal protection claim of the Nassau County recipients, by making it possible for their payments to be increased to the level provided for New York City recipients if the cost of living in Nassau County made such an increase appropriate. It concluded that "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." The three-judge court also held that the mooting of the constitutional claim made "academic" the question of whether it might have decided the statutory claim in the exercise of its pendent jurisdiction. It then ordered itself dissolved and remanded the case to Judge Weinstein "for such further proceedings as are appropriate." - F.

³ Law of May 9, 1969, ch. 411, §1 [1969 McKinney's Session Laws of New York 652-53].

Supp. — (1969). The same day Judge Weinstein issued an order temporarily restraining action under Section 131-a. Four days later he issued a preliminary injunction and denied appellants' motion to stay the injunction. On May 21 this court granted appellants' motion for a preference for their appeal from the order granting the preliminary injunction and denied appellants' motion for a stay without prejudice to renewal at the argument of the appeal. The appeal was argued on June 4, at which time the motion was renewed, and on June 11 this court stayed the injunction pending the disposition of the appeal. On June 16 this court denied appellees' motion to vacate the stay and denied appellants' motion to stay proceedings in the district court until the decision on the appeal from the preliminary injunction. The next day appellees appealed to the United States Supreme Court from the order of dissolution of the three-judge court. The appeal was accompanied by a petition for certiorari before judgment to this court and a motion to expedite Supreme Court consideration of the case. On June 18, while the appeal was still pending in the Supreme Court, the district court granted summary judgment for appellees and issued a permanent injunction. The same day appellants filed a notice of appeal to this court from the issuance of the permanent injunction. On June 19 this court granted appellants' motion to stay the permanent injunction and it also granted appellants' motion to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction. On June 24 the Supreme Court dismissed for want of jurisdiction the appeal from the dissolution of the three-judge court on the ground that the order was properly appealable to this court. The Supreme Court also refused to grant certiorari before judgment and denied appellees' motions to expedite review and to vacate the stays ordered by this court. 37 U.S.L.W. 3492. Appellees thereupon appealed to this court from the order dissolving the three-judge court and that appeal was consolidated with the appeals from the injunctions.

II.

We turn first to the issue raised by the appeal from the order of the three-judge court.

Appellees urge that the three-judge court erred in dissolving itself and that we should order it to resume its deliberations.

The court ordered itself dissolved because of the adoption of an amendment to Section 131-a permitting increased payments to AFDC recipients in Nassau County upon a determination by the Commissioner of Social Services that the increases are required in order to reflect actual cost of living. The three-judge court was of the opinion that the issue raised by the Nassau County plaintiffs was mooted by the amendment to Section 131-a and that the issue presented by the amendment itself was not yet ripe for adjudication.

We are persuaded that the court acted correctly. We are confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development. Obviously a determination by the court based upon the situation as it existed at the earlier date would have been premature and its decision would have been rendered moot by the provision of the new schedules for Nassau County. The court was right in refusing

to act on facts that were fluid and subject to early change. We affirm its order dissolving itself.

III.

Appellants contend that the single district judge erred in exercising jurisdiction to issue a preliminary and a permanent injunction on the basis of the statutory claim after the constitutional claim had become most and the three-judge court had dissolved itself.

Pendent Jurisdiction

The three-judge court specifically refused to decide whether it could have exercised pendent jurisdiction to rule on the statutory claim after it had determined that the constitutional claim was moot. — F. Supp. at — (1969). In remanding the case to the single district judge for "appropriate" action the court did not decide whether he could exercise such jurisdiction.

The single district judge ruled that it was proper for him to assert pendent jurisdiction over the statutory claim. ——
F. Supp. —— (1969). We find this conclusion to have been in error.

The assertion of a constitutional claim required the convening of a three-judge district court. 28 U.S.C. §2281 (1964). That court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any

claim over which the single judge could exercise adjudicatory power.

King v. Smith, 392 U.S. 309 (1968) provides no authority for deciding the pendent statutory claim. There the Court said:

"We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n. 3.

While the Court in King decided a pendent statutory claim, the constitutional claim to which it was pendent remained viable throughout the litigation. The Court exercised jurisdiction over the pendent statutory claim in order to avoid adjudication of the constitutional issue.

Moreover even if we were to accept the overbroad interpretation of the doctrine of pendent jurisdiction urged upon us by appellees, we would hold in the present case that the district judge's exercise of such jurisdiction was an abuse of discretion.

In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), it is clear that there are circumstances in which the exercise of pendent jurisdiction is inappropriate. We believe that it is inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.

A federal court should not assert such power over a state legislature unless there is no possible alternative. Even if the district judge had had discretion, he should have refused to rule on the statutory claim.

In King v. Smith, supra, the relief granted, enjoining the application of the Alabama "man in the house" regulation, did not have the effect of requiring the state legislature to appropriate additional funds. By invalidating the state regulation, the court substantially increased the number of eligible aid recipients but it specifically noted that Alabama was "free . . . to determine the level of benefits by the amount of funds it devotes to the program." Id. at 318-19 (footnote omitted). See Lampton v. Bonin, — F. Supp. — (E.D. La. 1969) (three-judge court).

The Department of Health, Education and Welfare is now engaged in a study of the relationship between Section 602 (a)(23) and Section 131-a. HEW, with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to do so, at least until HEW had completed its consideration of the matter.

Section 1331

The district judge also found that he had jurisdiction to decide the statutory claim under 28 U.S.C. §1331 (1964) which provides for jurisdiction over federal questions where "the matter in controversy exceeds the sum or value of \$10,000"

The district judge properly held that the claims of the members of the class may not be aggregated to satisfy the \$10,000 requirement. See Snyder v. Harris, 37 U.S.L.W. 4262 (U.S. March 25, 1969). He also correctly ruled that "the monetary loss to each of the plaintiffs

does not approach \$10,000." — F. Supp. at —. But after finding that appellees could not obtain jurisdiction by showing direct damage of \$10,000, the district judge decided that the "indirect damage" they might sustain as a result of their reduced payments was sufficient to satisfy the \$10,000 requirement. "Indirect damage" is too speculative to create jurisdiction under Section 1331.

"It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in Barry v. Mercein, 46 U.S. (5 How.) 103, 12 L. Ed. 70 (1847), a child custody case. The 'right to the custody, care, and society' of a child, the court noted, 'is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.' 46 U.S. at 120. Since the statute permitted appeals only in those cases where the 'matter in dispute exceeds the sum or value of two thousand dollars,' the court concluded that it was without jurisdiction:

'The words of the act of Congress are plain and unambiguous • • • . There are no words in the law, which by any just interpretation can be held to • • • authorize us to take cognizance of cases to which no test of money value can be applied.' 46 U.S. at 120.

Subsequent decisions have followed this reasoning.
See Kurtz v. Moffitt, 115 U.S. 487, 498, 6 S. Ct. 148, 29 L. Ed. 458 (1885); First Nat. Bank of Youngstown v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. Ed. 268 (1882); Giancana v. Johnson, 335 F. 2d 366 (7th Cir.

1964), cert. denied, 379 U.S. 1001, 85 S. Ct. 718, 13 L. Ed. 702 (1965); Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941); United States ex rel. Curtiss v. Haviland, 297 F. 431 (2d Cir. 1924); 1 Moore, Federal Practice ¶0.92[5] (2d ed. 1964)."

Boyd v. Clark, 287 F. Supp. 561, 564 (three-judge court, S.D.N.Y. 1968), aff'd on another issue, 393 U.S. 316 (1969) (footnotes omitted).

Section 1343

Appellees argue on two grounds that jurisdiction over the statutory claim exists under 28 U.S.C. §\$1343(3) and (4) (1964). Having found that jurisdiction existed under the doctrine of pendent jurisdiction and under Section 1331, the district judge did not rule on this issue.

Sections 1343(3) and (4) provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first contention of appellees is that their claim under the AFDC provisions creates a cause of action under 42 U.S.C. §1983 (1964), for which jurisdiction is conferred by Sections 1343(3) and (4). Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint, properly read, does not allege the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The burden of the complaint is that New York's statute, Section 131-a, is not in conformity with the requirements of Section 602(a)(23) of the federal statutes and that therefore New York is not entitled to receive federal grants under the AFDC program. Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See New York v. Galamison, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965); Bradford Audio Corp. v. Pious, 392 F. 2d 67 (2d Cir. 1968).

Moreover, it is clear that the defendant Department of Social Services for the State of New York is not a "person" within the meaning of Section 1983. See Monroe v. Pape, 365 U.S. 167, 187-92 (1961); Clark v. Washington, 366 F. 2d 678, 681 (9th Cir. 1966); Williford v. California, 352 F. 2d 474 (9th Cir. 1965). Since the suit here con-

stitutes an attack on a state statute, and not on action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He too is therefore not within the scope of Section 1983.

Appellees' second contention is that the Social Security Act, which contains the AFDC provisions, is a law providing for "equal rights" so that jurisdiction exists under Section 1343(3) independently of the existence of any claim under the Civil Rights Act. Section 602(a)(23) is not designed to secure "equal rights" for purposes of Section 1343(3).

IV.

Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds.

Under the AFDC provisions in effect prior to the enactment of Section 602(a)(23), the states, in order to receive grants under the federal program, were required to set a standard of need under which recipients qualified for payments but they were not required to pay the full standard and in practice many of them did not. See King v. Smith, supra, 392 U.S. at 318-19, 334. As originally proposed, Section 602(a)(23) would have required each state to pay its full standard of need and to adjust that standard annually in accordance with changes in the cost of living. H.R. 5710, \$202, 90th Cong., 1st Sess. (1967). In the statute as finally adopted both the provision requiring the states to pay their full standard of need and the provision requiring an annual cost of living adjustment in that standard were eliminated.

⁴ See note 2, supra.

Section 602(a)(23) now provides:

"§602(a) A State plan for aid and services to needy families with children must . . .

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The appellees contend that the mandated cost of living adjustment requires that all states which, prior to the amendment, were paying benefits equal to their full standard of need must continue to pay their full standard adjusted to reflect the cost of living as of July 1, 1969. In effect, they argue that 602(a)(23) sets a floor under state AFDC benefits, freezing them at their previous level plus the cost of living adjustment.

We believe that Section 602(a)(23) was not intended to have anything like this broad a scope. We read it as making two far less dramatic changes in the law. First, it requires each state to make an adjustment in its standard of need by July 1, 1969, to reflect changes in the cost of living, but does not require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them. The second change required by the statute was not intended to affect New York at all. It refers to a practice employed in many states, not including New York, of imposing a maximum on the amount of aid a family may receive, regardless of its

size.⁵ The statute requires that family maximums of the type imposed by these states are to be adjusted by July 1, 1969, to reflect changes in the cost of living.

Our construction of Section 602(a)(23) finds support in the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the states. The Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the level of benefits. See King v. Smith, supra, 392 U.S. at 318-19, 334.

The Conference Report on Section 213 of the bill, which contained the version of Section 602(a)(23) that was enacted, indicates the correctness of a narrow interpretation. In discussing the portion of the pre-Conference version of Section 213 that dealt with certain non-AFDC recipients, the Report states that the Section would have required "each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable," and thus mandated an increase in aid. However, in explaining the portion of Section 213 that, except for a change from an annual cost of living adjustment to a single such adjustment, became Section 602(a)(23), the Report states only that the bill would require each state to "adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967),

Maine, for example, provides \$27 per month for each child after the first but permits a family to receive a monthly grant of no more than \$250. See Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969), where a three-judge district court ruled that the Maine regulation imposing a family maximum violated the equal protection clause of the Fourteenth Amendment. See also Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968, 1969) (three-judge court).

reprinted in [1967] U.S. Code Cong. and Admin. News 3179, 3208-09. The absence of any statement that the portion of Section 213 relating to AFDC payments was intended to effect an adjustment in "the extent of [each state's] aid or assistance" is significant in view of the fact that the immediately preceding discussion of the portion of Section 213 relating to other kinds of assistance refers specifically to such an adjustment in "the extent of . . . aid."

The absence in the legislative history of any support for appellees' interpretation of the statute as imposing a floor on payments is especially significant in view of the long-standing Congressional practice of not imposing such restrictions on the states. As HEW said of Section 602(a)(23) in the brief it submitted in Lampton v. Bonin, supra, "The Congress could hardly have paid less attention to it." It is inconceivable that if this were the far reaching measure serving to reverse a basic national policy which plaintiffs claim it was, it should be adopted without comment from committees and individual members of Congress.

That Section 602(a)(23) was not intended to have the broad effect urged by appellees is further indicated by the fact that it is not even discussed in the "Summary of Social Security Amendments of 1967," a joint publication of the Senate Committee on Finance and the House Committee on Ways and Means, which was prepared for the use of the two committees by the committee staffs. Similarly the "Summary of Principal Provisions" of the Senate bill contained in the Senate Finance Committee report

⁶ HEW's brief expresses agreement with our view on the fundamental proposition that Section 602(a)(23) did not mandate increases nor freeze floors, but left the states free to reduce AFDC payments. However the HEW analysis differs from ours in some respects.

makes no mention of the provisions that became Section 602(a)(23). S. Rep. No. 744, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. and Admin. News 2834, 2840.

V.

We find that the only obligation imposed on New York by Section 602(a)(23) is that sometime between January 2, 1968, the effective date of Section 602(a)(23), and July 1, 1969, the deadline imposed by the Section, it must adjust its standards of need to reflect the cost of living. The schedules in Section 131-a are based on prices as of May, 1968. Thus New York has complied with Section 602(a)(23).

The two injunctions are vacated and the decision granting summary judgment for appellees is reversed. The order of the three-judge court dissolving itself is affirmed.

LUMBARD, Chief Judge (concurring):

I concur in the result.

While I agree with much of Judge Hays' opinion our differences on some issues necessitate this separate statement.

I rest my concurrence on the ground that the district court abused its discretion in rendering judgment on the pendent claim.

The district court, in my view, did have pendent jurisdiction over the statutory claim in the sense of judicial power. The Supreme Court has held that power exists "in the federal courts" to decide a pendent claim when, (1) it is joined to a constitutional claim which is not insubstantial, and, (2) the nature of the pendent and constitutional claims are such that the plaintiff "would

ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966). Both of these tests are satisfied in this case.

The fact that the three-judge court declared the constitutional claim moot and thereupon dissolved itself, referring the proceedings back to the single judge district court, did not deprive the district court of pendent jurisdiction. Pendent jurisdiction, in the sense of judicial power, attaches at the outset of a suit. See *United Mine Workers* v. Gibbs, 383 U.S. 715, 727 (1966). The subsequent dismissal of the constitutional claim, Gibbs makes clear, does not deprive the federal courts of all power over a properly joined pendent claim. What it does do is to mandate a reassessment by the three-judge court, or by the single district judge upon referral by the court, of the propriety of proceeding further on the pendent claim. The question becomes one of discretion, and not of judicial power in the strict sense. See id. at 726-27.

I know of no authority which prohibits a three-judge court, after it has disposed of a constitutional claim, from referring any remaining pendent claims to a single judge for appropriate disposition. A flat prohibition on such references does not recommend itself from the standpoint of judicial convenience and economy, for often a single judge will be able to dispose of the pendent claims more expeditiously than the cumbersome three-judge court machinery. Of course, the three-judge court might well have dismissed the pendent claim, but, for reasons which are not stated, it did not do so.

In any event, the propriety of the single judge's decision concerning whether or not to proceed to judgment on a pendent claim is subject to review for abuse of discretion, and that is the issue I find squarely presented in this case.

There is force to Judge Hays' suggestion that one factor relevant to the exercise of the district court's discretion is the nature of the remedy sought by plaintiffs. Here the remedy was extreme: an injunction against the operation of a welfare program under a state statute. Congress established the three-judge court mechanism to insure that a state statute would not be enjoined on constitutional grounds simply on the decision of a single judge. While a three-judge court is not required when an injunction is sought on statutory grounds, as here, nonetheless the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge. This is particularly true in a case such as this, where the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge. Cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), holding that pendent state claims should be dismissed if the constitutional claim is dismissed before trial.

It is true that the pendent claim in this case is founded upon federal law, thus making the exercise of jurisdiction by a federal court less objectionable than if the claim arose under state law. But here, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of \$131-a and the proper construction of \$602(a)(23) of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program

and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not §131-a is in compliance with §602(a) (23).¹ This is HEW's responsibility under the Social Security Act, see 42 U.S.C.A. §1316 (Supp. 1969). I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning §131-a. The Department's determination, it should be noted, will be reviewable in the courts at the instance of either the state, under 42 U.S.C. §1316(a)(3) (Supp. 1969), or the plaintiffs under the Administrative Procedure Act.

While I agree with Judge Hays' treatment of the jurisdictional issue raised under 28 U.S.C. §1331, we differ somewhat with respect to the application of 28 U.S.C. §1343(3) and (4). I do not find that the plaintiffs' claim under \602(a)(23) involves the redress of either "equal rights" or a "civil right" as those terms are used in §1343. I do not believe that the claim, although one founded on a federal right, falls within the ambit of 28 U.S.C. §1983, for it lacks the constitutional overtones that have been present in all the welfare cases cited by the plaintiffs which have been sustained under that section. But even if a broad reading of §1983 is accepted it cannot change the nature of the plaintiffs' claim for the purposes of §1343. On its face it is clear that \$602(a)(23) has nothing to do with "equal rights," and it also cannot be said to involve a "civil right" in view of the circumstances which gave

In King v. Smith, 392 U.S. 309 (1968), a case much relied on by plaintiffs, HEW had already given notice to the state that its regulation did not conform to the requirements of federal law. 392 U.S. 326 n. 23. Thus the challenge to the regulation made in the King suit was ripe for resolution by the courts.

rise to the enactment of §1343(4) in 1957. See U.S. Code Cong. & Adm. News, 85th Cong. (1957), pp. 1966, 1976, H.R. Rep. No. 291.

Since I do not feel that the federal courts are the appropriate forum for the initial resolution of plaintiffs' statutory claim, I do not reach the merits of that claim. At the same time, I should add that Judge Feinberg's view of the merits does not persuade me.

Feinberg, Circuit Judge (dissenting):

The decision in this case allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them by reducing payments to thousands of welfare recipients already living at a bare subsistence level. This result follows from a restrictive interpretation of the district court's jurisdiction and allowable discretion and of the meaning of the applicable federal statute. I respectfully but emphatically dissent.

Because of the differences in the opinions of my brothers, it is necessary to describe them precisely. As I understand it, they agree that the three-judge court properly dissolved itself. Judge Hays rules that the single judge thereafter had no jurisdiction; Chief Judge Lumbard is of the view that the single judge had the power to decide the case, but agrees with Judge Hays that it was an abuse of discretion to do so. Finally, Judge Hays decides that section 131-a of the New York Social Services Law does not conflict with the 1967 amendment of the Social Security Act referred to as section 602(a)(23). Chief Judge Lumbard does not deal with the merits, although he finds unpersuasive the interpretation of section 602(a)(23) contained in this dissenting opinion. I dissent from the

holdings that the single judge lacked jurisdiction or abused it, and that section 131-a does not conflict with section 602 (a)(23). Discussion of the propriety of dissolution of the three-judge court is deferred to point III below. I turn first to the question of the jurisdiction of Judge Weinstein to grant plaintiffs relief.

I. Jurisdiction of the single judge.

On this aspect of the case, the issue is whether the United States District Court for the Eastern District of New York had jurisdiction to determine whether federal funds were about to be spent in a manner that would violate a federal statute. Thus stated, the question begs for resolution in a federal court, rather than in a state forum as appellants contend. Moreover, the formidable intricacies of three-judge court procedure should not be allowed to obscure this basic issue.

The district court judge originally convened a threejudge court on April 24, 1969, plaintiffs' complaint having challenged section 131-a of the New York Social Services Law on two main grounds: first, denial of equal protection of the laws because residents of Nassau County would be discriminated against by new payment schedules below those for residents of New York City, and second, conflict with a federal statute, 42 U.S.C. §602(a)(23). Thereafter, the three-judge court held a hearing. While the issues were before it, the New York State legislature adopted an amendment to section 131-a, which the threejudge court felt rendered the equal protection claim moot. Accordingly, that court dissolved itself on May 12, 1969, and remanded the matter back to the single judge. On May 15. Judge Weinstein issued his opinion and on May 16, his order from which appeal has been taken.

Judge Weinstein's conclusion that he had jurisdiction was based upon two theories: that jurisdiction to decide the federal statutory claim was pendent to the federal constitutional claim and that jurisdiction also existed under 28 U.S.C. §1331. He noted that there might also be independent jurisdiction over the federal statutory claim under 28 U.S.C. §1343(3), but found it unnecessary to decide that question. I agree with the district court judge that pendent jurisdiction existed even though the federal constitutional claim of denial of equal protection had been eliminated from the case. I reach this conclusion by either of two routes.

A. Assume that the jurisdiction exercised over the statutory claim was that of the three-judge court. In King v. Smith, 392 U.S. 309 (1968), the Supreme Court made clear that when a federal constitutional claim and a federal statutory claim are joined together, the three-judge court has power to decide the latter. In fact, that is what the Supreme Court did, putting aside the constitutional issue. It is true that in footnote 3, the Court said (392 U.S. at 312):

We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

However, that referred to a suit brought only on the statutory ground, a situation not present in that case or here. Indeed, in *Florida Lime & Avocado Growers*, *Inc.* v. *Jacobsen*, 362 U.S. 73, 80-81 (1960), the Court said that a properly convened three-judge court has jurisdiction

"over all claims" raised against a state statute. The footnotes in that opinion at pp. 81-82 make clear that the
quoted phrase applies not just to claims based upon a
federal statute but even to "local questions" arising under
a state constitution and to "every question involved,
whether of state or federal law." Therefore, if the threejudge court in this case was properly convened, as it said
it was, it had the power to decide the statutory claim. It
chose not to do so on its theory that the constitutional
claim had become moot, stating:

We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. King v. Smith, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

Thus, it is not clear whether the court thought it could or could not exercise pendent jurisdiction, or whether it was deciding that no judge should exercise that jurisdiction or was leaving the question for the single judge. In any event, the matter was remanded back to the single judge "for such further proceedings as are appropriate." Therefore, Judge Weinstein was left with the possibility that the pendent jurisdiction he said that he exercised was that of the three-judge court passed back to him. Cf. Landry v. Daley, 288 F. Supp. 194 (N.D. Ill. 1968). If he was exercising that jurisdiction, then under the cases cited above his power to do so was clear, unless the moot-

ness of the constitutional claim prevented him, an issue discussed further below.

B. Assume, however, that because the three-judge court had been dissolved the case must be considered on the theory that the pendent jurisdiction allegedly exercised was only that of the single judge district court. Both the constitutional and statutory claims were in the complaint as originally filed. Judge Weinstein convened the threejudge court to consider both but pointed out that if it should subsequently be determined that a three-judge court was not required, "the single judge's decision, as part of that three-judge court, would become the opinion of the Court." When the complaint was filed, the federal constitutional claim of denial of equal protection of the laws was not frivolous and clearly fell within the jurisdictional language of 28 U.S.C. §1343(3), since it sought to redress the deprivation, under color of a state law, of a right secured by the Constitution. The substantive statutory basis for the action was 42 U.S.C. §1983. Insofar as the constitutional claim is concerned, the only reason for a three-judge court was that plaintiffs sought to enjoin the "enforcement, operation or execution" of a state statute. 28 U.S.C. §2281. That did not change the jurisdictional basis; it was a concomitant of the relief sought. At the time the complaint was filed, Judge Weinstein had sufficient "jurisdiction" over the constitutional claim to grant a temporary restraining order, 28 U.S.C. §2284(3), as indeed he did. It is unnecessary to speculate whether in appropriate circumstances the single judge could have, on the basis of the constitutional claim, granted damages against defendant Wyman in an individual capacity or

See, e.g., Monroe v. Pape, 365 U.S. 167 (1961); Kletschka v. Driver,
 F. 2d — (2d Cir., April 22, 1969).

issued a declaratory judgment to plaintiffs if they had limited themselves to the two prayers for declaratory relief in the complaint instead of adding another for injunctive relief as well.2 In fact, plaintiffs took the position before Judge Weinstein that a three-judge court was not required because, inter alia, declaratory relief was sought. While Judge Weinstein thought that the request for injunctive relief made a three-judge court necessary. it is not accurate to say that he had no jurisdiction over any aspect of the constitutional claim when the complaint was filed. If such jurisdiction did exist-and I believe that it did-a closely related statutory claim could also be decided by a single judge under the general principles of pendent jurisdiction, liberally construed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966).3 Therefore, Judge Weinstein had pendent jurisdiction over the federal statutory claim at the time the case first came before him. It may even be-although it is not necessary to resolve that

That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment require a three-judge court but noting:

[[]T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. Kennedy v. Mendoza-Martines, 372 U.S. 144, 154-155 (1963); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960).

And see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13-20 (1964).

³ The basic and pendent claims "must derive from a common nucleus of operative fact," 383 U.S. at 725, clearly present in this case, e.g., the level of benefits before and after section 131-a and the relationship between benefits and need. The court has power to hear all of the claims if plaintiffs "would ordinarily be expected to try them all in one judicial proceeding," id., assuredly the case here.

issue—that the judge could have acted upon plaintiffs' suggestion that he decide the statutory issue first and convene the three-judge court later, if necessary. Cf. Kelly v. Illinois Bell Telephone Co., 325 F. 2d 148 (7th Cir. 1963); Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F. 2d 317 (6th Cir. 1958); but cf. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960). The judge declined that invitation not because he thought he lacked the power to so rule but because he felt that convening the three-judge court would avoid "costly" delay.

The crucial question on either theory A or B is whether the elimination thereafter of the constitutional claim as moot necessarily divested the district court of jurisdiction it already had. In *United Mine Workers* v. Gibbs, supra, the Court did say, 383 U.S. at 726:

Certainly, if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well.

But the Court spoke there in the context of a federal against a state claim. The point here is that the alternative claim to which pendent jurisdiction attached was not a state claim at all, but a claim based upon a federal statute. Moreover, the dismissal of the constitutional claim here did not occur "before trial" but after Judge Weinstein and the three-judge court had spent days in taking evidence and hearing argument on the motion for an injunction. Indeed, Judge Weinstein issued a preliminary injunction only three days after dissolution of the three-judge court and without any further hearing. Moreover, appellants concede that, in effect, at that point a

full trial had been held. Certainly there have been instances where pendent jurisdiction has been allowed to continue even though the basic federal jurisdictional claim has been denied, see, e.g., Hurn v. Oursler, 289 U.S. 238 (1933); United Mine Workers v. Meadow Creek Coal Co., 263 F. 2d 52, 59-60 (6th Cir.), cert. denied, 359 U.S. 1013 (1959); Travers v. Patton, supra, 261 F. Supp. at 116; cf. Murphy v. Kodz, 351 F. 2d 163 (9th Cir. 1965), or mooted. Hazel Bishop, Inc. v. Perfemme, Inc., 314 F. 2d 399 (2d Cir. 1963).

The reasons Judge Weinstein gave for retention of jurisdiction were as follows:

The pendent claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designated to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.

⁴ See Appellants' Application for a Stay of Further Proceedings in the District Court, June 13, 1969, at 2:

The extraordinarily broad nature of the preliminary injunction in this case and the opinion of the Court below which supported it is such that every real issue in the case had been decided by the District Court and is presently before this Court.

A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the testimony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. Resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date-July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

These were compelling considerations. Whether pendent jurisdiction exists depends in part upon the same reasons which justify its exercise. On these facts, jurisdiction was justified by the saving of judicial time once the case had gone as far as it had, by concern for fairness to the litigants, and by the appropriateness of having a federal court decide the issue whether congressional conditions to receipt of federal funds are met. See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 664-71 (1968). It should also be noted that a three-judge court in Texas, faced with a similar issue, has apparently just ruled for plaintiffs in that action on the basis of the same federal statute

involved here, while also denying various federal constitutional claims. *Jefferson* v. *Hackney*, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969) (opinion to follow judgment).

Various other arguments regarding the exercise of discretion by the district court remain to be answered. The contention is made that the pendency of an administrative proceeding by the Secretary of Health, Education and Welfare made the district court action "premature" or inappropriate. That "proceeding" was apparently pending in April, and we are not favored with any indication of HEW action other than its request to New York State for further information. The delays inherent in HEW review and the difficulty of obtaining effective exercise by HEW of any sanction were obvious in King v. Smith, 392 U.S. 309, 326 n. 23 (1968), in which the Court professed no qualms over deciding the issue of construction of the Social Security Act then before it, although HEW had not acted definitively. Cf. Damico v. California, 389 U.S. 416 (1967); Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967). In view of the overpowering justification for Judge Weinstein's exercise of discretion to decide the statutory issue. I would not regard the speculative possibility of HEW action as a ground for reversal. If plaintiffs are correct on the merits, as I believe them to be, they will continue to suffer severe and possibly irreparable injury for an indeterminate length of time while HEW studies the problem and negotiates with the state. At the very least, therefore, even under the point of view of the majority, the court should exercise its jurisdiction to the extent of enjoining the operation of the New York statute pending completion of HEW proceedings.

Nor do I agree with the suggestion that the action of the district court was improper because it in effect ordered the state to appropriate additional funds. The district court's holding merely establishes that New York must meet the federal conditions requisite to participation in the federal program or cease its participation. Such a ruling is neither improper nor unprecedented. Thus, a number of courts have recently determined that state maximums on the amount of aid to AFDC families were invalid as violating the equal protection clause or the Social Security Act or both. In at least two of these cases the courts took pains to point out that they were not affirmatively ordering the respective states to appropriate additional funds but only holding that if the states had appropriated insufficient funds to meet the total need they could not "correct the imbalance" by applying the invalid maximums. Dews v. Henry, 297 F. Supp. 587, 592 (D. Ariz. 1969); Williams v. Dandridge, 297 F. Supp. 450, 459 (D. Md. 1968); cf. Westberry v. Fisher, 297 F. Supp. 1109, 1116 (D. Maine 1969). The majority opinion distinguishes King v. Smith, supra, because it "did not have the effect of requiring the state legislature to appropriate additional funds." It is true that the Court there emphasized the latitude of a state in setting "its own standard of need and . . . level of benefits," 392 U.S. at 318, but the effect of section 602(a)(23)was not involved in that case. Moreover, I do not believe that either King v. Smith or Shapiro v. Thompson, 37 U.S. L.W. 4333 (U.S. April 21, 1969), which deals with residency requirements, would have been decided differently even if it had been assumed—and the assumption seems logical that the rulings would increase the expense to a state. In the latter decision, the Court noted that "appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification." Id. at 4337 (footnote omitted). In any event, were it necessary, we could follow the example of the three-judge court judgment in Jefferson v. Hackney, discussed above, which stayed the injunction of the invalid Texas statute for 60 days in order to give the state an opportunity to implement a plan conforming to the requirements of the federal statute. While it may be likely that New York would in fact decide to appropriate additional funds rather than to take some other course of action, that probability is not equivalent to the judicial usurpation of state legislative functions.

Finally, the point is made that a single judge somehow abuses his discretion by enjoining a state statute on the ground that it conflicts with a federal statute. If all that is meant is that it would have been better for three judges rather than one to have ruled on the statutory claim in this case, I agree. The three-judge court had that claim before it and should have decided it rather than dissolving. See point III below. However, if the point is that the single judge in granting injunctive relief thereafter abused his discretion merely because he was a single judge, I disagree. Congress has made the decision not to require three judges when the claim for injunctive relief is based on a federal statute rather than on the Constitution. Swift & Co. v. Wickham, 382 U.S. 111 (1965). Whatever may be the merits of a contrary point of view-see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 55-64 (1964)—the change should now come from-Congress.

Thus, I conclude that Judge Weinstein had pendent jurisdiction over the statutory claim whether that jurisdiction be of the three-judge court or a single judge court.

Jurisdiction was not lost because the constitutional claim became moot. The judge did not abuse his discretion by deciding the statutory claim on the merits. On this theory, it is not necessary to decide whether, as appellees contend, there would be jurisdiction under 28 U.S.C. §1343(3) or (4) over a case brought on the statutory claim alone. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 111-15 (1967). Finally, it is equally unnecessary to decide whether Judge Weinstein was correct in holding that there was jurisdiction under 28 U.S.C. §1331.

Under the rulings of my brothers, the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute. The United States District Court for the Eastern District of New York originally had jurisdiction over that claim. Thereafter, the three-judge court was properly convened, according to its own statement, and continued to have that jurisdiction. That court never denied that it could exercise such jurisdiction and did not reject it. Yet, the jurisdiction which both the single judge court and then the three-judge court had has now somehow magically disappeared or is inappropriate for exercise. I dissent from this grudging assessment of the jurisdiction and discretion of the district court.

II. Legality of section 131-a.

Since Judge Hays not only holds that the district court lacked jurisdiction to determine the substantive issues raised in the case before us, but also expresses his views on the merits, I will set forth my reasons for dissenting on that issue as well. This requires an analysis of the interaction of the federal statute, section 602(a)(23), and the New York statute, section 131-a.

Basic to analysis of the fundamental clash between the two statutes is an understanding of how the program of Federal Aid to Families with Dependent Children (AFDC) operates. The AFDC program is over 30 years old and no state is required to participate in it. But all do and receive payments from the federal government in varying amounts on a matching fund basis. Thus, in New York, 50 per cent of all funds paid to "needy dependent children and the parents or relations with whom they are living," 42 U.S.C. §601, is provided by the federal government. Clearly, then, there is an overwhelming federal interest in the administration of the AFDC program in New York. since the state and the federal government pay for it equally. While administration of the AFDC program is left to the individual states, each state's plan for payments must be approved by the federal government and must meet the requirements of the Social Security Act. 42 U.S.C. §602.

To take advantage of federal AFDC payments, each state must set forth a standard of need and provide a level of benefits based upon this standard. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). The standard of need is determined by adding together the cost of those items deemed necessary for subsistence. As might be expected, both the standard of need and the benefits actually paid vary in content and amount. As to the former, judgments vary in the several states as to what items are necessary for subsistence and what they cost. As to the latter, some states pay 100 per cent of what is defined

⁵ Actually, the state's direct monetary interest is even smaller, as local governments provide a substantial portion of the non-federal funds.

as the standard of need, while others pay an amount which is less than the standard of need, either by fixing benefits at a percentage of that standard, or by imposing a flat maximum on the amount of benefits to a family. New York has paid 100 per cent of the standard of need, as it defines it, and still purports to follow that course.

It is against this background that we must assess the effect of congressional enactment in 1967 of section 602(a) (23), which requires of each state's AFDC plan that it:

provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

The critical flaw in appellants' arguments is that they unavoidably require accepting the proposition that in enacting section 602(a)(23) Congress was engaging in a virtually meaningless exercise of ineffectual verbiage. Simply stated, under the proffered interpretation of this legislation, if at some time between January 2, 1968, the date the section became law, and July 1, 1969, a state has complied with the statute's direction that

the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully

In determining the amount of aid to be paid to a particular individual or family the state may, of course, take into consideration other income or resources of the recipient. See 42 U.S.C. \$602(a)(7), (8).

changes in living costs . . . and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted

the state has at once fully satisfied the congressional requirement and is thereafter free promptly to nullify the adjustment and reduce its AFDC payments back to their original levels or, as in the case of New York State, to substantially lower levels. This hypothesis, inherent in appellants' position, makes a mockery of congressional purpose.

It may be useful to summarize just what the State of New York has done. In August 1968, the Department of Social Services, pursuant to its usual practice, adjusted its standard of need to reflect the rise in the cost of living as determined by a survey it had previously conducted. Even if this initial increase was sufficient "to reflect fully" cost of living changes, however, any attempt at compliance with section 602(a)(23) was vitiated by the passage thereafter of section 131-a of the New York Social Services Law. That section not only wipes out the modest increases of August 1968, but effects additional and very substantial reductions in welfare benefits to the great majority of AFDC recipients. First, the amounts of the regular, recurring payments to families of specific sizes for their fundamental needs are no longer related to the actual age of the oldest child in each family but are standardized sums based on a mean age of the oldest child in all recipient families of that size, an adjustment which results in sharp reductions in regular grants to many families with older children. In addition, "flat grants" to cover major expenditures for clothing and home furnishings are substantially abolished and almost all previously existing "special grants" to cover extraordinary individual needs such as medically-dictated special diets, maternity expenses, homemaker services, and the like are eliminated.

The district judge concluded that the actual impact of these changes was "substantial." For example, he found that the new law was "a subterfuge to enact drastic cuts in both the standard of need and level of payment"; that in New York City the net effect of the law will result in increases in assistance to 245 families and decreases to approximately 173,900 families; and that "the decrease in total AFDC payments under the New York State program is no less than \$75,000,000" annually. On the evidence before the district court, these findings were justified and were surely not "clearly erroneous." Indeed, my brothers do not challenge them. While appellants originally took the position before us that there was no real reduction in the standard of need, no amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments. The crucial question is whether doing so violates a congressional directive contained in section 602(a) (23).

Before consideration of that issue it is helpful again to focus on the basic concepts here involved. There are a number of hypothetical ways for a state to affect welfare payments. It can raise or reduce its standard of need, concluding that a greater or lesser sum is sufficient for subsistence. Whether it pays as benefits 100 per cent, or some lesser percentage, of that standard of need, a change in the standard changes the actual payments. A state can also keep its standard of need constant, but change the percentage of that standard which it will pay. Or a state can leave both its standard of need and level of benefits intact in theory, but impose a flat dollar maximum on the amount

going to any one family or adjust the amount of an existing maximum. Section 602(a)(23) refers to changes in "amounts used . . . to determine . . . needs" or in "maximums . . . on the amount of aid paid"; it does not specifically refer to a change in the percentage of the standard of need that a state pays.

I come now to the question of what section 602(a)(23) was designed to accomplish. The language clearly calls for an increase in standards of need and in dollar maximums to take account of an increase in the cost of living of which Congress, like the rest of us, was clearly aware. Ordinarily, an increase in either would cause an increase in money benefits paid out by the state. However, this effect could immediately be negated by any of the devices described above, i.e., by then reducing the standard of need after having increased it, or by reducing the percentage of benefits paid, or by reducing dollar maximums. New York has utilized the first technique and appellants would attribute to Congress the intention of requiring an increase in the standard of need but not caring whether it is thereafter promptly reduced. Even the brief of the United States Department of Health, Education and Welfare, relied on in footnote 6 of the opinion of Judge Hays, appears to balk at such outright nullification of section 602(a)(23).

⁷ Thus, the brief notes:

If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living cost. The second sentence of the regulation seeks to foreclose this possibility

Appellants' position attributes to Congress an intention to appear as though it were accomplishing a result which it knew was not being achieved. I am reluctant to presume that to be the case. The language of section 602(a)(23) means something, it certainly calls for an increase in standard of need, thereby suggesting an increase in benefits, and I do not see why it also simultaneously suggests its own nullification. The legislative history relied on by Judge Hays is inconclusive. It shows that the administration bill originally sought a greater increase in benefits (a requirement that all states pay 100 per cent of need) and an annual cost of living adjustment. That something less emerged does not prove that nothing at all was done; if anything, it tends to show the reverse. Appellants argue that Congress could not have enacted even a temporary "floor" on benefits with so little discussion. But undoubtedly such instances have occurred before. While of some weight, the absence of discussion can hardly be controlling. In his opinion granting the preliminary injunction Judge Weinstein painstakingly outlined the progress of section 602 (a) (23) through Congress in reaching his determination as to the congressional purpose behind it. He noted that the inadequacy of present welfare payments throughout the states was repeatedly stressed as the motivation for the proposed legislation, and that although additional provisions originally proposed with the section were dropped, the wording of the basic requirements of section 602(a)

and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

To adjust maximums on the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23) [section 602 (a)(23)], and would not constitute compliance with that section.

(23), and presumably the purpose behind it, emerged virtually unchanged.*

Section 602(a)(23) is now the subject of litigation in a number of courts. Prior to this case, the only other federal judge who has undertaken an analysis of the section concluded that it prevented a cut in benefits. In Lampton v. Bonin, - F. Supp. - (E.D. La. 1969), a three-judge court was convened to determine the validity of a ten per cent reduction in AFDC grants by the Louisiana Department of Welfare, which plaintiff recipients attacked on a number of grounds, among them that the reduction violated section 602(a)(23). In a decision rendered in April 1969, two of the three judges held that the question was premature, since the state had until July 1, 1969 to comply with the statute. - F. Supp. at -. In a lengthy dissent, Cassibry, J., did reach the merits of the issue, and concluded that the section prohibited any reduction in benefits even before July 1.

Congress necessarily intended to maintain at least the status quo by setting a floor below which ADC payments could not be reduced, which is certainly the level of ADC payments on January 2, 1968, the base figure from which the increases required by section 402(a) (23) [section 602(a)(23)] are to be determined. Though this prohibition on reductions is not expressly stated in the statute, it is necessarily implied, for any other conclusion is "plainly at variance with the policy of the legislation as a whole."

ADC payments in all states are predicated upon the need standard; if this standard is increased, as section

See Rosado v. Wyman, — F. Supp. — , — . — (E.D.N.Y. 1969). See also note 9, infra.

402(a)(23) requires, the budgetary deficit must also increase accordingly. In those states paying the budgetary deficit in full, as well as in those states that pay only a percentage of the budgetary deficit (or the standard of need), section 402(a)(23) necessarily requires increased ADC grants correspondent to the increase in the standard of need, for a percentage maximum (100 percent or less) kept constant automatically translates increased need into an increased payment. Similarly, in those states imposing an arbitrary dollar maximum on the size of the assistance grant, section 402(a)(23), by requiring that the maximums imposed be adjusted in accordance with the change in the cost of living, insures increased grants for all recipients. Regardless of which system of computing ADC payments the state follows, section 402(a)(23) is therefore designed to effectuate increased ADC recipient grants. The language of the statute could not be any clearer. ___ F. Supp. at ___.*

More recently, a three-judge court in Texas considered the issue whether a cut in AFDC benefits violated section 602(a)(23). Although the opinion of the court has not yet issued, its judgment has; the latter indicates that the court unanimously concluded that a reduction in benefits violates the federal statute. Jefferson v. Hackney, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969).10

⁹ The dissenting opinion also carefully analyzed the legislative history of section 602(a)(23) and concluded, as did Judge Weinstein, that though not voluminous the history of the section clearly evinced a congressional intent that state AFDC payments be increased. — F. Supp. at —.

¹⁰ See also Williams v. Dandridge, 297 F. Supp. 450, 464 (D. Md., 1968), where the three-judge court noted in dictum:

As it shows on its face, \$213(b) [section 602(a)(23)] was designed to increase benefits to keep pace with increased living costs.

In both cases, the statutory issues were whether Congress intended by section 602(a)(23) to put at least some floor under welfare payments, and whether the state statute ran counter to that intention. In neither instance did the state legislation reduce a standard of need; rather, the mechanism used to lower benefits was primarily a reduction in the percentage of payment applicable to that standard.11 Even though that legislative device is not mentioned at all in section 602(a)(23), both Judge Cassibry and apparently the Texas court felt that the federal statute prevented indirect as well as direct evasions of congressional intent. In this case, the action of the State of New York is in even sharper conflict with section 602(a)(23) because. according to the trier of fact, New York has done the one thing that the section is undeniably designed to prevent: i.e., the State has directly reduced the standard of need despite the admonition of the section to adjust that standard "to reflect fully changes in living costs." Indeed, New York has reduced the standard—and therefore the benefits paid -to a level below the standard in effect for most recipients before any cost of living adjustment.

I do not suggest that the meaning and effect of section 602(a)(23) are unmistakably clear. But, on balance, I think that its language and the legislative history relied on by Judge Weinstein show that Congress intended AFDC payments throughout the country to be increased somewhat to reflect the rise in the cost of living and that the levels of payments so adjusted were to remain stationary

Apparently both Louisiana and Texas formerly paid on a basis of 100% of their standards of need, subject to dollar maximums on the amount of aid to any family. After increasing its standards to comply with section 602(a)(23), Texas evidently reduced its percentage payment to 50%; Louisiana merely cut all grants by 10%, including those grants based on dollar maximums. See Lampton v. Bonin, supra.

— F. Supp. at — & n. 16.

at least pending further congressional action. That this intention was far from unreasonable is sufficiently demonstrated by the fact, supported by ample evidence on the record below, that even in New York State, which has one of the highest levels of AFDC benefits in the United States, AFDC recipients live at or below a bare subsistence level. Accordingly, I conclude that since New York has not complied with section 602(a)(23) properly read, the injunction was justified.

III. Dissolution of the three-judge court.

The last issue concerns the appeal from dissolution of the three-judge court. I think that there is a very substantial question as to whether the court was correct in holding that the amendment to section 131-a rendered plaintiffs' constitutional claim either "moot" or "unripe." Plaintiffs very persuasively argue that the only effect of the amendment was to grant purely discretionary administrative power to increase the level of Nassau County payments and that the mere possibility that such discretion might be exercised to cure an allegedly prohibited discrimination is far from sufficient to void the constitutional issue. Nor is it at all clear that the subsequent increase of the Nassau County payment schedules retrospectively corroborates the dissolution of the three-judge court, since plaintiffs assert-and defendants do not deny-that the increase still fails to bring Nassau County levels of payment up to those in New York City. Cf. the recent convening of a three-judge court in Rothstein v. Wyman, No. 69 Civ. 2763 (S.D.N.Y., July 7, 1969).

Moreover, my view is that the three-judge court should have decided the statutory question which concededly remained in the case before it. All of the reasons referred to in Part I of this opinion for the exercise of pendent jurisdiction by Judge Weinstein alone applied to the threejudge court. In addition, dissolution of the court allowed the argument to be made—and to be accepted—that the jurisdiction of the three-judge court had disappeared. It would have been quicker, simpler and more appropriate to the kind of pressing issues before that court if it had exercised its power to the fullest.

If I thought that the dissolution of the three-judge court completely divested Judge Weinstein of all jurisdiction then I would regard the decision to dissolve as an abuse of discretion and would dissent on that ground too. However, as Part I, supra, indicates, I do not attach that consequence to dissolution and, accordingly, need not go that far.

DD. Judgment of Court of Appeals for the Second Circuit (Document No. 68 [Court of Appeals])

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July one thousand nine hundred and sixty-nine.

Present:

Hon. J. Edward Lumbard, Chief Judge,

Hon. Paul R. Hays,

Hon. Wilfred Feinberg,

Circuit Judges

Julia Rosado, Lydia Hernandez, Marjorie Miley, Sophia Abron Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Marjorie Duffy, individually and on behalf of their minor children, and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

V.

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Dept. of Social Services for the State of New York,

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is granting summary judgment for the appellees be and it hereby is reversed.

It is further ordered, adjudged and decreed that the orders of said District Court granting preliminary and permanent injunctions be and they hereby are vacated and that the order of the three-judge court dissolving itself be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellees.

/s/ A. Daniel Fusaro Clerk

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EE. Oral Argument of Lee A. Albert on Respondents' Motion to Convene A three-Judge Court on April 18, 1969 Before Judge Weinstein (Document No. 59)

[At Page 104]

[104] MR. ALBERT: If I may continue where I left off, your Honor, on the question of a three-Judge Court, the only claim that conceivably [105] could require a three Judge Court in this case that is even arguable is of course the equal protection claim brought by the Plaintiffs from Nassau County.

It is beyond peradventure that alone a supremacy clause Federal statutory claim does not require a three-Judge Court, and that's been firmly decided by the Supreme Court.

The questions raised by the equal protection claim in regard to the three-Judge Court are twofold: the first is the nature of the relief that is being sought. It is not an insubstantial question in terms of whether a three-Judge Court must be convened where a declaratory relief only is asked for on a Constitutional claim. The history of the statute makes very clear that what was certainly at the heart of the provision requiring three-Judge Courts was a notion of comity based upon the peculiarly abrasive effect of a single Judge enjoining a high state official from doing certain acts, and therefore putting him under the power of contempt for doing those acts.

The Court, recognizing to be sure this [106] purpose, as well as the severe disruption in the Federal Court system of convening three-Judge Courts, as well as the effect on the Supreme Court's own crowded Appellate Document by three-Judge Court cases, has quite strictly and narrowly construed the three-Judge Court requirement. It is indeed stated often on many occasions, including recently, that it is a technical requirement, not a measure of broad social policy, and is to be utilized accordingly.

We are sure the Court has not ignored the mandate of the statute but has applied it with the thought in mind of the functions of that statute as to what it was to prevent. Looking at decisions of the Supreme Court dealing with this very question of a declaratory judgment, there aren't many—the ones there are are all in one direction. Flemming against Nestor was a Constitutional challenge to a provision of the Social Security Act, and a substantial challenge. The Court held in that case that it was to be heard by a one-Judge Court, and one of the reasons, the main reason, [107] was that the relief sought was a declaratory judgment. It reaffirmed that holding in more detail in Kennedy v. Mendoza-Martinez, a challenge to the Immigration and Naturalization Act, or the expatriation provision.

It is true, your Honor, that in many cases declaratory relief will have the same effect as an injunction on a state officer who will voluntarily abide by such a declaration. Nonetheless prayers for declaratory relief on both pragmatic and theoretical grounds are quite distinct from prayers for injunctive relief.

THE COURT: Well, you have asked for such other relief as may be proper. I take it I could grant equitable relief in addition to a declaratory judgment under your complaint.

MR. ALBERT: Were it to be warranted, to be sure.

I don't understand the argument as to why the declaration itself would not be sufficient. One would have to find first that there is substantial likelihood of non-compliance of immediate harm on the equal protection claim [108] that requires preliminary relief. We have left that out, your Honor, let us be very candid about that, because we did not want that claim to impede the progress of the more fully dispositive single legal issue, to wit, the 402 (a) (23) claim. That's the reason for the division, and our entire reason for it.

It's plain that the statutory-

THE COURT: But that sometimes may result in a longer delay because if it shouldn't be a one-Judge Court then it has to go up to the Court of Appeals, and then maybe to the Supreme Court, and they may say, "Well, you should have had it as a three-Judge Court." And then it comes back and starts all over again.

MR. ALBERT: I think, your Honor-

THE COURT: In King v. Smith, in effect they were saying, I take it—or you could read the opinion that way—that although a one-Judge Court could have done it, since there was a valid three-Judge Court basis it was all right to go ahead that way, and they would affirm on a one-Judge Court ground.

[109] I don't know whether you save any time by taking a short cut.

MR. ALBERT: Judge Weinstein, the problem—we fully appreciate the dangers involved in an uncertain three-Judge Court issue in not having a three-Judge Court. But let us recognize also there are very substantial dangers involved—perhaps of an equal sort— with a very vexed three-Judge Court issues in having one, which is another reason why I think we have limited ourselves to declaratory relief.

If a single Judge in convening is wrong, one, the issue is of course relitigated before the three-Judge Court. It becomes jurisdictional, as well as all the other jurisdictional issues in this very case are relitigable before the three-Judge Court.

Given the fact that the three-Judge Court is going to be asked to hear first and alone the 402 (a) (23) claim, the

issue of whether it should or not must be faced by it. It is possible that the three-Judge tribunal could decide otherwise, and we would be starting again.

[110] If they do not and they hear the 402 (a) (23) claim, at that point we are faced with the problem of whether that tribunal was proper, which means we must file multiple appeals, with all the difficulties that entails.

If the three-Judge Court turns out to be erroneous, then we are back to square one from a decision of the Supreme Court or the Court of Appeals.

So that the alternative choices faced by Plaintiffs I don't think wholly differ.

THE COURT: Well, if the three-Judge Court shouldn't have been convened, doesn't the one-Judge decision remain valid?

I remember there is some question about that, but isn't there some support for that?

MR. ALBERT: If the three-Judge Court is unanimous.

THE COURT: Yes.

MR. ALBERT: If it's unanimous, then that decision—the one Judge who joined in it, whether or not he wrote it or not is irrelevant, it's quite true—would be standing. It's still [111] an open question, and you would have multiple appeals.

THE COURT: You will go to both Courts?

MR. ALBERT: Both Courts. However, the uncertainty arises where that panel is not unanimous. There the issue becomes somewhat more complex.

Is the 2-1 District Court a District Court in the same sense as a one-Judge Court would be? And that hasn't been decided at all.

But we think that the case law makes more than sufficiently dubious the convening of the three-Judge Court in this case. Kennedy-Mendoza dealt with the issue of a

three-Judge Court quite expressly and said in this case, and indeed in broader language than that—the declaratory relief does not warrant the convening of a three-Judge Court. And that was a challenge to a Federal statute on nation-wide applicability.

One of the explanations for it was the possibility of vexatious litigation, repetitious litigation, for some shopping for a Judge who might hold in your favor, which was not present [112] there, and two, the relief was limited in scope to this particular party. Both of these features are here.

The Nassau County Plaintiffs—that's a class action, they can't bring another action. Two, the relief is indeed limited which then provides a bridge to the second and more serious, probably, problem in convening a three-Judge Court in this case, and that is the notion of state-wideness.

The line of Supreme Court decisions states very clearly that regardless of whether it is a state statute or a local statute, whether it is a state officer or a local officer is not determinative at all. Those are formalisms.

What is important is whether the acts sought to be enjoined are to be carried on throughout the state and whether the impact of the relief you ask for is to be statewide or not.

There are state statutes in many of the cases in which the Court expressly held that the impact was local and no three-Judge Court was proper, such as Prince Edward County, the school segregation case.

[113] If one looks to the Nassau County Equal Protection claim, by its very premises, the Acts sought to be enjoined are in Nassau County. That's the subject class. But more importantly and fundamentally, by the very premises of the equal protection claim the relief could not extend beyond the Greater New York City metropolitan area.

The claim is—and I'd like to reach that, some points about our Constitutional right to welfare—the basic claim

is that in respect to need people in Nassau County and New York City stand in the same position. No other legitimate state purpose—saving resources arbitrarily is not a legitimate state purpose in this structure—provides justification therefore for creating differentials in the amounts granted to meet the same needs. That's the claim.

Our proof on that claim, our general proof will deal with cost-of-living studies of the New York City metropolitan area provided by the Department of Labor, for example.

[114] Our specific proof will deal with Nassau County and nothing else. The declaration or an injunction cannot extend—cannot tell Commissioner Wyman to do anything more than not apply those differentials shown to be invidious because need is equal to those persons within the areas in which need is equal. And that means Nassau County.

There is not an authority, your Honor, which in that situation would not deem that to be a local claim. The greater metropolitan area or Nassau County are but subdivisions of New York State.

It is by no means conceivable how that can be deemed to be a statewide claim. The fact that it's in a state statute, the fact that it's a state official is just not controlling, and the cases make that very clear. And we are dealing with cases of the highest authority.

Hence, it seems to us there are enormous, grave doubts that a three-Judge Court should be convened to hear that equal protection claim. And there is no other claim to hear.

[115] Let us for the moment proceed to assume that your Honor decides that a three-Judge Court should hear that equal protection claim. I should say in an aside that Mr. Weinberg has argued that the impact of the relief in this case would be enormous. That may be true on the 402(2) 23 claim. That is statewide in any sense of that term. But that is quite irrelevant to the three-Judge situation.

A three-Judge Court convened to hear that claim for that reason alone would plainly be improper. Assuming now that the equal protection claim required a three-Judge Court, the next question is—the next question we proceed to face is whether that three-Judge Court should be convened before a decision of the dispositive 402 statutory claim and that a three-Judge Court should hear that 402(a) 23 claim. We are of the view that we would like this Court to hear that claim to avoid the delay incident to a three-Judge Court, to preclude the necessity of relitigating jurisdictional issues and the possibility of returning to a one-Judge Court should your [116] Honor be overruled, and to obtain an expeditious determination of the 402(a) 23 dispositive claim.

THE COURT: Now, could I decide that question and issue a separate judgment which would be seperably appealable without holding the case until the rest of the claim was decided?

MR. ALBERT: I think your Honor certainly could, but I don't know that that would be necessary because we believe that this is a dispositive claim, because we believe that this is a very strong one, we are moving this one as best we can in a motion for a preliminary injunction. We are making no motions in regard to the equal protection claim for now because it has to be in the course of decision that this 402(a) 23 claim precedes decision on the Constitutional issue, because it avoids the unnecessary resolution of such issue.

THE COURT: Then I take it you would want your preliminary injunction on that with the thought then that that would be appealable, [117] while I would hold the rest of the case here for later determination.

MR. ALBERT: I think the answer to that is clear: Were your Honor to rule for us on the 402(a) 23 claim, that would be the end of the case, that would be dispositive of the case. And the whole case would be appealed. I mean there would be nothing to appeal on the equal protection

claim, nothing was done on it, but I mean the case, the claims as joined, would go up.

THE COURT: I just wouldn't reach the other point in the case, the other claims that you had. I would just decide—grant a judgment for you, which the State would then appeal, as being dispositive of the whole case.

MR. ALBERT: Correct. But it would, because there is nothing further to say about differentials between the reduced levels in Nassau and New York if the entire schedule for both areas and the rest of the State is invalid. So there is nothing left of the case after that.

The injunction would run against the [118] entire amended Act.

THE COURT: Then if I decided against you on that claim, you would want me, I take it—no, you say I still wouldn't have to have a three-Judge Court.

MR. ALBERT: For the reasons-

THE COURT: That only Nassau would be involved?

MR. ALBERT: (Continuing): That this argument—that's correct. This whole argument, your Honor, doesn't arise unless you assume first that the equal protection claim requires a three—judge Court. You have to resolve that first.

If you resolve that it doesn't, then none of these considerations pertain. They only pertain when you say it does.

And at that point this question then comes up: Were you to rule against us on those claims, you would t'ien determine that the equal protection claim was substantial, in the sense of the three-Judge Court substantial, which I will get to in a moment. That is different from Federal jurisdiction [119] substantial.

And finding it substantial you would then convene a three-Judge Court.

There is, your Honor-and we agree-

THE COURT: Have there been litigations where this multi-step process has been used, a one-Judge Court handl-

ing some of these issues and then if it decided the other issues had to be approached convening a three-Judge Court?

MR. ALBERT: Yes, your Honor, there have. There are two lines of cases some of which, I should add, follow Florida Lime, to not make that issue dispositive: There are the severability cases, Hobson against Hansen, followed by other District Courts, which sever off in convening a three-Judge Court those issues which are not necessary for the three-Judge Court to resolve.

THE COURT: But they convene the three-Judge Court first. But have you got cases where they went the other way, the District Court severed and made its decision as an individual Court, and then left matters for [120] subsequent determination by the three-Judge Court?

MR. ALBERT: There are two such cases. There is a Supreme Court decision written by Justice Holmes, Ex Parte Hobbs, in which there was a dual establishing on rates established by the Commissioner of Insurance in Kansas.

THE COURT: And that case has never been called into question?

MR. ALBERT: That's never been called into question. The decision by Justice Holmes upholds the way of proceeding.

More recently, more recently there was a decision by then-Judge Stewart, now Justice Stewart from the Sixth Circuit, in Chicago, Duluth and Georgian Bay Transit, where the single Judge, Judge Stewart, resolved the state law issue, and he did so in favor of the Plaintiffs, so no three-Judge Court was convened. That procedure was cited by the United States Supreme Court in Idlewild Bon Voyage Liquor Corp. in 1962 with apparent approval. That was not the [121] issue in Idlewild, but it was a compare.

In Idlewild the single Judge acted improperly in abstaining and disposing of the case that way. If one looks to the decisions relied on by the State for the necessity of hearing both together—of course Florida Lime is the main deci-

sion there—it's quite apparent that what the Court was facing in that case was the question of, one—the initial question was whether it had jurisdiction; that depended on whether the three-Judge Court had the power to decide both Constitutional and non-Constitutional issues in the case. The Court said yes it did, in no uncertain terms.

And if you look at the choices—there was a dissent by Justice Frankfurter joined by Justice Douglas in it—the Court said if the three-Judge Court doesn't have such power, in that case it must be heard entirely by a one-Judge Court, then we will have one-Judge Courts who decide the statutory grounds against the Plaintiff issuing injunctions on Constitutional grounds, very flatly in violation [122] of the statute, which it clearly is.

Justice Frankfurter in dissent said "I don't find my solution very satisfactory, I don't find the Court's solution very satisfactory; under my solution there will be a whole category of cases in which single Judges will be issuing injunctions on Constitutional grounds."

It's very clear that the issue faced by the Court in that case was the question of whether the three-Judge Court must decide all the issues before it once the case is before it, or may, has the power to decide and then go up on appeal.

And the answer there clearly is yes, for reasons that are quite obvious. Once the three-Judge Court is convened, it would be foolish not to allow it to decide at least issues which require a unitary hearing.

Subsequent cases, after Florida Lime—that's Hobson against Hansen and cases like that—make very clear that the three Judges do not have to hear those issues which are discrete and severable in the sense [123] that we talked of.

I think it plain that our two claims here are discrete and severable, though they form part of one case only in a pending jurisdiction case.

There is no authority whatsoever holding this procedure improper, holding the one Judge deciding the non-Constitutional issue improper, and the reasoning certainly in Florida Lime, confirmed in Chicago, Duluth I think is the case, certainly doesn't in any way indicate that one way may not do that, which one Judge may not do, he may not issue an injunction on a Constitutional ground. We agree with that of course.

It may be said under this procedure that Plaintiffs have a great deal of latitude in posturing a case so they have one Judge or three Judges. Plaintiffs traditionally and always under the rules have a great deal of latitude in so doing by the very fact that they choose the forum, the timing, they choose the motions they make.

Furthermore even under the three-Judge [124] procedure Plaintiffs by merely casting a claim, a Constitutional claim in the terms as applied, as opposed to direct attack on a statute—it's clear in those cases that a three-Judge Court is not required.

There is a progeny starting from Ex Parte Bransford in 1940, which is also an answer to the declaratory judgment point.

It is true that a declaratory judgment has inhibiting effects, but so does an action for damages where a Constitutional provision is held—I'm sorry, a provision is held to be unconstitutional. The inhibiting effect of that is equally as great, and so is the res judicata effect.

The situation we think here for the single judge deciding the dispositive claim is particularly compelling where we have multiplicity of Plaintiffs, where we have a group of Plaintiffs joining in one claim and we have only some of those Plaintiffs bringing the additional three-Judge Court convening claim.

For example, if it is found by your [125] Honor that there is independent jurisdictional basis for the claims of the Plaintiffs from New York City who don't have a constitutional claim, they only have a statutory claim, it's quite clear that, one, those Plaintiffs could have brought that claim here alone, and there would be no discussion of a three-Judge Court; so empowering the Plaintiffs to do this, to shape their complaint in such a way, is hardly offensive to what goes on every day. In addition to which even at this stage if your Honor found that their dispositive claim had an independent jurisdictional basis, because of the attendant delays in three-Judge Courts, they would, it would seem to us, have the right to proceed before your Honor alone.

To be sure, your Honor, if he convened a three-Judge Court in the Nassau County case could hold that decision, obviously. My point is that there is a great distinction between these claims which does warrant, it seems to me, an allocation of judicial manpower consistent with that. The functional waste involved in having a three-Judge Court [126] decide, come together to decide solely the non-Constitutional claim, which would be the case here at first at least, it seems is a waste of judicial manpower.

THE COURT: But in any event your position is that if the Nassau people brought an independent suit there would be no three-Judge Court there?

MR. ALBERT: That's also—that's very much our position. I am only going into this, your Honor, on the assumption that the cases don't mean what we think they mean and we are wrong. That's exactly right.

FF. Transcript of Proceedings of April 23, 1969 Before Judge Weinstein (Testimony of Joseph H. Louchheim) (Document No. 61)

[At Page 134]

DIRECT EXAMINATION

BY MR. WEINBERG:

Q. Would you state your present position? A. I am Deputy Commissioner in the State Department of Social Services, in charge of New York City affairs.

Q. Would you give your educational background? A. I have a B.S. in Economics from the Wharton School of Finance and University of Pennsylvania, and a degree from the School of Social Services Administration, University of Chicago. A J.B. degree from the University of Chicago, School of Law.

I am a member of the New York Bar, but not a practicing attorney.

Prior to my present position, for a period of three months, I was commissioner of the City of New York, Department of what was then known as Welfare. Prior to that, for two years, I was the First Deputy Commissioner of that Department.

I have been Deputy Commissioner with the [135] Department of Real Estate, in charge of relocation for the City of New York.

I held positions with the Federal Government previous, with the State Department of Social Welfare and Deputy Commissioner in charge of Institutions and Agencies.

I have been a part-time instructor at the Columbia School of Social Welfare and full time assistant professor at the School of Social—they changed the name—School of Social Workers, University of Pittsburgh.

Q. Do the duties of the Department of Social Services of the State include the general supervision of the whole welfare or Social Services Agendes within the State? A. It does.

Q. Have you had occasion to familiarize yourself to some extent to the practice in that regard in the Department of Social Services of the City of New York and Nassau County? A. Only the City of New York.

Q. In the City of New York, are the names of all welfare recipients electronically data processed by computers? [136] A. I don't know if the name is, but the case iden-

tification is.

Q. And the checks are processed through electronic data

processing? A. That is correct.

Q. In your estimation, how long would it take to adjust the payments received by those welfare recipients to comply with the mandate of this statute which goes into effect July 1st? A. I have no great expertise in this area than Commissioner Goldberg, but based on previous experience which Mr. Goldberg did have in which he did do a recomputation of all budgets in the City of New York in October of 1968, I agree with his statement that it takes between six weeks and two months.

Q. If the statute were to be invalid between now and July 1st, how long in your estimation would it take the City of New York to readjust its program back to continuing the present level of grants? A. Well, some of the local welfare districts, local welfare centers in the City of New York, have ABC, Automatic Budgeting Computation, and of course it would be easier in those.

I checked with our experts in EDP and I think a [137] great deal would depend upon what time the shift in signals came. But if, as Commissioner Goldberg indicated, what they might do with the tape is modify the tape and

make changes.

On our calculations, we believe that only four-tenths of one per cent of the cases now receiving public assistance in New York would have an exact same grant under the 131A as they were at the present time. If that estimate is correct, there would be 99 per cent changes.

And therefore, it would seem to me what you would do-I am not an expert-but is to set up a new tape and then

what you could do is use the old tape if there was a change which would not involve the erasures of the old tape.

Q. Would there be any additional expenditure in keeping the old tape, to the best of your knowledge? A. I wouldn't know. Storage charge? I don't know what you mean.

Q. If the old tapes which gave the present level were to be run through the machines, then would there be any delay in processing the applications of welfare recipients at the present level? A. No, except certain changes will have to be made [138] in the old tape to show any change that occurred during the months period.

Q. At least they could receive the check they had been getting prior to the institution of the statute? A. If my information is correct from the experts in Albany, the answer is yes.

Q. In the event that the statute was declared invalid, the Department would have the duty of notifying the 67 welfare districts throughout the State to continue the present formula? A. Yes.

Q. How long would it take to provide such notice? A. In New York City it would just take one minute. I would call Commissioner Goldberg immediately and follow up with a formal letter.

Q. To the best of your knowledge, how long would it take in the other districts? A. Certainly less than twenty-four hours.

Q. If local districts did not promptly comply and go back to the old payments on the assumption that the statute were to be declared invalid, would the State have a supervisory responsibility and the power [139] to step in on a situation like that to assure that every welfare recipient got whatever he was entitled to? A. If I understand your question correctly, you are saying that as it stands now is each local welfare district required to implement 131A, the answer is yes, and there would be supervision by the State to see that was done.

Q. Suppose on June 1st you were notified that 131A was declared invalid by this Court or any other court for that matter and you notified X County or City and it became evident they weren't taking steps to comply with the mandate of that court with the statute, would the Department of Social Services have the power to step in that situation and insure compliance completely? A. Yes, or penalize them for non-compliance, yes.

Q. We heard testimony from Commissioner Ginsberg and Commissioner Goldberg earlier today to the effect that there has been-actually from Commissioner Goldbergthere has been increasing anxiety on the part of welfare recipients because of the imminence of this change.

Incidentally, is it a fact that every welfare recipient is going to receive a reduction as a [140] result of the implication of it? A. Again, the research department has made studies with regard to the effect of 131A, both on upstate New York and on New York City.

As far as upstate New York is concerned, there estimate is, are that families-the families who will receive an increase based on 131A amount to 49 per cent. Families receiving decreased amounts to 51 per cent-which was the aim of 131 for upstate New York on the basis of flat grants. Some would benefit and some would not.

As far as New York City is concerned, the percentages are different and the reason for them being different is the upstate figure was based on the sole recurring grant. In New York City both the figures that the City put out and our calculations in making the calculation we included the cyclical grant which, as Commissioner Ginsberg pointed out, was \$100 per year per family or \$400 for a family of four. So that what we did take was family of four-we took the new recurring grant under 131A and compared that with the grant that the family would have gotten under the old schedule which New York City was FA-1, and then we added the \$400 across the board for different sized [141] families.

Our calculations were, and they differ from those that were submitted by Commissioner Goldberg—the Commissioner, Commissioner Ginsberg said about 80 per cent would be adversely affected—and according to our figures 41.5 per cent would receive increases, 58.1 per cent would be decreases, and there was no change in four-tenths of one per cent.

THE COURT: These percentages, are they families or individuals?

THE WITNESS: Based on families.

BY MR. WEINBERG:

Q. You had some years of experience in administering Social Service and dealing with welfare recipients, have you not? A. Yes.

Q. Has it come to your attention, since the enactment of this statute, that there has been any greater anxiety on the part of welfare recipients than there was previously? And if so, could you document that. A. No. From my personal knowledge, I haven't any information in that regard. But certainly the persons living on public assistance always have anxieties. [142] Living itself is a difficult proposition. There are changes all the time. Cyclical grants benefit some and harm some. There was an anxiety when that went into effect. I am certain there was anxiety when there were two changes made in the medical assistance law.

Now, as I came here I saw the big group meeting, rallying in front of City Hall, and certainly there is anxiety.

I think the fact that there are welfare rights group, and they get the welfare recipients to join them in a common cause, and the welfare recipients may feel that there are people with the same difficulty in meeting their needs as they have—I think to some extent it may have a therapeutic value.

Q. In your estimation, does the thought of litigation, which leaves an uncertainty as to whether or not the new statute is going to go into effect, lessen or heighten that anxiety? A. I think it would be the same with the welfare recipient as it is with Commissioner Goldberg, he wants to know what—

Q. If the question was still up in the air, so to speak, as a result of an order of a court which [143] left the question unresolved, would that heighten the anxiety or lessen it? A. That I couldn't tell. Some might say it would lessen the anxiety and increase the depression—I don't know.

I am not an expert on that.

Q. You say that welfare recipients are more or less realistic when it comes to financial matters than the average person? A. I think they have to be realistic in order to survive on the limited budget they have. Certainly, included in this are individuals, because of age or incapacity, are unable to take care of themselves and in those cases the local Department of Welfare brings in homemakers and advises them about home economics and so forth, but I think the majority on public assistance are very careful with their pennies and of necessity have learned to squeeze every penny.

Q. Has it come to your attention that there are more welfare recipients requiring psychological guidance or psychiatric assistance since the announcement of 131A? A.

That has not come to my attention.

MR. ALBERT: I object. I think we are going far afield. [144] THE COURT: I think we can bring this to a close.

MR. WEINBERG: One or two further questions. THE COURT: Go ahead.

BY MR. WEINBERG:

Q. Commissioner, isn't it a fact that in 1968 the State Department of Social Services took steps to comply with the Social Security Act provision—as you know was an issue in this case—by raising the standard in order to reflect fully the adjustment in the cost of living during that period? A. Yes. The State Department of Social Services did issue a new schedule under date of August 23, 1968, based on the cost of living as determined under the May, 1968 survey which they made. This is in conformity with the Social Service law which says that there has to be recalculations every year if the cost of living has increased above

a certain percentage. And that was put into effect on August 23rd—at least an administrative letter went out and each local Department of Social Service was required to make this modification within nine months after August 1st, so that all [144a] of them will have done it by May 1st.

As I said in my testimony earlier, New York did that as of October 1968.

[145] Commissioner, I show you this document. Will you tell the Court whether that is the document you were referring to a moment ago in your testimony? A. Yes, this is Administrative Letter 68P.W.D.525, August 23, notifying the Commissioners, local Commissioners of Social Service, of the change in schedule, and that this should be done eight months—excuse me, not nine months, eight months after promulgation, which does make it May 1st.

And this first one is a receipt from the Health, Education & Welfare showing that we did submit these new standards of assistance, and it was approved by them under date of September 11, 1968.

MR. WEINBERG: I have a copy of that for counsel.

THE COURT: Yes, offer it. Defendant's Exhibit-

MR. WEINBERG: I offer that in evidence as Defendant's Exhibit A.

THE COURT: Mark it, please.

(Administrative letter dated August 23rd marked Defendant's Exhibit A in evidence.)

MR. WEINBERG: We have no further questions.

[146] MR. ALBERT: Your Honor, I believe this was described as a two-part exhibit, or two letters. I only have one letter, it appears.

MR. WEINBERG: Well, it may be a Xerox copy. Doesn't that contain the Health, Education & Welfare letter?

We have no further questions at this time.

CROSS EXAMINATION

BY MR. ALBERT:

Q. Mr. Louchheim, was it your testimony on direct that based on your conversations with experts in Albany in com-

puter programing in regard to the Public Assistance Administration that it was entirely possible for steps to be taken in total preparation for implementation of the cuts without any irreverisble step to be taken, that is, it could be reversed—preparing full steam ahead for implementation, this was fully reversible at any time in June? A. I didn't say that in my—in my testimony.

Q. I'm sorry, would you clarify that. A. I believe in my direct testimony I did say that the experts up in Albany agreed with Commissioner Goldberg that if he had the guidelines he could do it between [147] six-six weeks and

two months. That was my first statement.

Q. Take the steps necessary to implement, yes? A. Yes. Secondly I said that now what—what would be done if there was a reversal would in part depend upon at what time the whistle was blown. I said that I was given to understand that if there were, as our statement indicated, approximately 99% changes based on 131, that probably what they would do was run a new tape instead of trying to modify the existing tape, in which case they could use—they could continue the old tape and use the old tape that went back, with of course the proviso that any modifications that were made in the case load between the months—the last month that they used the tape and the next month would be taken into consideration.

Q. Well, presuming those modifications would be rather few, due to the fact that most case workers would be giving their time to new tapes, to recomputing the budget for each case—is that correct, 99% of the cases? A. Yes.

Q. So that by saving the old tape—how long does it take to put the old tape back into the machine? A. I haven't

the slightest idea.

Q. But presumably from your testimony that's a [148] rather—not a very significant amount of time, so long as

you have the old tape? A. It is my thought-

Q. So then it is your testimony that full steps could be taken now preparing to implement, and as long as you saved the old tape those steps would be reversible by using the

old tape? A. This is what I am given to understand. With the modifications, as I pointed out, making changes in the old tape based upon changes which had occurred since the last tape was used.

Q. Is it your understanding that there is a tape for each case? A. My understanding very definitely is that there is

not a tape for each case.

Q. Can you describe perhaps what this tape represents?

A. I can only do it in very general terms, and that is that it is the—the tape consists of a roll of the individuals who are eligible for—to receive the next semi-monthly installment, and that what that does is have on it the amounts and the identification.

Q. Of the individual family- A. That's right.

[149] -in the ADC program and ADC unit, it would?
A. If-whether or not it was on tape for ADC or whether or not all are combined, I do not know.

Q. Are you saying that one tape represents the entire case load of the city? A. I'm sure it's more than one tape, but whether or not that the tapes which they used are by categories or not I do not know. But the tapes are available.

Q. How often is there a mandatory investigation of budgeting of clients for verification of their right to receive the same thing they were receiving before under state law?

A. It depends upon the category.

Q. Aid to Dependent Children category? A. ADC, there has to be a minimum visit I believe every three months and

reverification every six months.

Q. So that for the bulk of cases in that category there is not a rebudgeting more often than every three months?

A. Recent. Recent.

Q. Is it fair to characterize the legislative changes as a simplication in budgeting? Is it easier to budget a family under the new schedule than it was under the old one? [150] A. Very definitely.

Q. A substantial simplification? A. It's a simplification which is in accord with the recommendations and the regulations of HEW, yes.

Q. So the time involved in budgeting in a given case under the new schedule is far less than the time involved in rebudgeting a case under the old one? You have to know much less information, do you not? A. Well, it isn't so much the information that you have to know as the chance of making error less. In the old system what you had to know was the age of the oldest child plus the number of people in the family plus the rent and any other special items.

Q. And— A. Now you have to know the number of the family—in the family and the rent, so what you are

stating is the age of the oldest child.

Q. And it is your judgment that under the new simplified system it will take six or eight weeks to budget all the ADC families in New York City? A. I believe it will take just as long to budget under the new system as under the old, and it has been demonstrated that it can be done in between six and eight weeks in the old manner. So it certainly should not take long.

[151] Q. Even though the old system is far more complex, it is your testimony that it will take the exact time

under the new one? A. I said no longer.

Q. If one were to going rebudget from the new system each family in New York City would that take about six weeks too? A. If one was to what?

Q. Assuming we had the implementation of the new schedules and we suddenly were going to rebudget the entire case load for the old schedules, putting aside the old tapes now for the moment, please, would that take approximately six weeks, or eight? A. If you—if you were not going to use the tapes?

Q. If you are putting aside those of the old tapes, that's correct, you are to make up a new budget for each of these families? A. If you took away the tapes you would still have the information which the caseworker had, which he submitted to E.D.P., on which the old tapes were made.

Q. Yes, which you now have towards doing the new system, of course. But Mr. Louchheim, it's your testimony

to implement the new system in New York City will take six to eight weeks? [152] A. That's because you would have to recalculate the budget. If you went back to the old system a caseworker would have in his record what the—what the old budget was, and therefore the only changes you would have to make is where there was a change in the family situation during that month, one-month period or two-month period.

Q. The figures that you used about the percentage of increases and decreases upstate, does that include Nassau County, Mr. Louchheim; when you say upstate do you mean non-New York City or do you mean only really upstate? A. With your permission, your Honor—

THE COURT: No, I understand what you mean.

THE WITNESS: No, with your permission-

THE COURT: Well, go ahead.

THE WITNESS: -could I modify the original testimony?

THE COURT: Yes, you may.

THE WITNESS: This wasn't—the figures that I gave of 49% and 51% was not for all of Upstate New York.

Q. I'm sorry. A. It was only for Upstate New York which had the same [153] budgetary recurring grant as New York City did. Those came under what is technically called Schedule SA-1. And SA-1 applied to New York City and the following counties: Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester.

This 49%-51% didn't include Herkimer or some of the smaller counties.

- Q. And do those figures refer to the ADC case load or the entire public assistance case load? A. They refer to the entire case load—
- Q. Including all the other categories? A. —which, as you heard from the direct testimony of Commissioner Ginsberg and Commissioner Goldberg, is the largest portion of the cases in New York City.
- Q. In ascertaining these figures you totally excluded any amount of money people were receiving for any special grant? A. I did not. As I indicated in my direct testimony—

Q. I'm sorry. A. -that in doing it for New York-

Q. No, I'm talking about it for Upstate, these figures are Upstate figures? A. These only deal with the recur-

ring grants.

Q. That is you excluded, then, all amounts [154] received for special grants? A. And as far as New York City is concerned when we included the cyclical grant, which includes Item 5 and 6, or Code 5 and 6, Code 5 being household supplies, Code 6 being clothing, that 5 and 6 when it was a special grant involved 90% of the total amount of monies spent by New York City on special grants.

[155] Q. The \$100 Cyclical? A. The Five and Six,

which was then made into the Cyclical.

Code Five and Six before the Cyclical involved 90 per cent of all the special grants given in New York City.

Q. Indeed wasn't the reason for the special Cyclical the fact that Code Five and Six grants were running rather high; that was indeed the motivation for the Cyclical? A. I think since the declaration—since the demonstration project was initiated by New York City and approved by us—I think it's a question for you to ask New York City.

Q. I'm sorry, I didn't hear your last answer.

THE COURT: All right, go on to the next question.

Q. In making these calculations of percentages you haven't gone further into the amount of increase or relative amount of decrease suffered by the various groups, have you? A. Yes, I have. Did you want—

THE COURT: Yes, let me have them, please.

THE WITNESS: Again for increases, [156] increases of \$1.00 to \$199, New York City 31.5%, Upstate—when it's upstate I just mean the counties I enumerated—Upstate 35.5%. Increases of \$200 and over, 10% in New York City, 13.5% in the upstate counties.

As for decreases: Decreases of \$1.00 to \$199 of 27.2%

in New York City, 26% in the unstate counties.

Decreases of \$200 and over, 30.9% in New York City, 25% in upstate.

And no change, is the same for the increases, there is no change in any increase.

THE COURT: Well, do you think that those upstate figures are typical in all the counties, that is, would this gross figure be sufficiently typical to give us an indication of what the Nassau situation is?

THE WITNESS: The Nassau situation is included in this. THE COURT: I understand.

THE WITNESS: Oh, I see. You mean is Green, Monroe, Suffolk, Ulster and Westchester different from Nassau, which would affect it?

THE COURT: Yes.

[157] THE WITNESS: I don't think I could—I don't think I could answer that. Certainly if this is done, as I am certain it was, on a number of cases, since Nassau, Suffolk and Westchester and Monroe, where the living conditions are approximately the same, it would seem to me there wouldn't be a great difference. Greene might—Greene and Ulster might be slightly different.

Q. Mr. Louchheim, let me ask you an overall question: Do the cuts as proposed represent an overall savings, the amount to be spent on welfare, for the present case load size per person throughout the State of New York, not getting into who is benefitted and who is hurt? Is there an overall dollar saving per person based on the present expenditures per person in the State of New York? A. Certainly there is a dollar saving.

Q. Is that a substantial savings? A. It's substantial. I don't know what your definition of substantial is.

THE COURT: Well, how much?

THE WITNESS: Everything-everything in Welfare is substantial.

[158] Q. How much do you save per person, or— A. I don't know the—first of all, the package which you saw in the—in the papers, for example in the State they talk about a figure of \$128 million.

THE COURT: This Court is not advised on that point.

THE WITNESS: Now, from the standpoint of only part of this, this cut—and as I indicated, there are some that benefit and some that decrease.

Q. Yes, I understand. A. Let me also say, since you asked the question, that you—the question was raised in regard to moving expenses, in regard to other expenses, which are special grants. And I believe it was Commissioner Goldberg who said that he believed that there was something that may happen on that, but he hadn't been advised officially.

I can say to you that the Department and the Governor's office have submitted to the Legislative leaders a proposition which they believe or which we believe the Legislative leaders will act upon favorably, which will permit the purchase of service for certain items, which can be done by rules and regulations of the State Department of Social Services and the State [159] Board of Social Welfare, which doesn't involve an increase in the recurring grant in dollars but does permit purchase of say moving expenses, does permit the including in the rent, the rent deposit, and sometimes the breakage fees which are included, which are demanded by the Housing Authority, and so forth.

It also would naturally continue purchase of day care services, homemaker services and other services.

Q. Anything that can be delivered in the form of a service might be saved if what, the Legislative leaders accept this proposition? A. It does not need legislation.

Q. But you just said it was being discussed with the Legislative leaders. A. I said it was being discussed with the Legislative leaders and we have reason to believe there will be favorable action on some of the special items. And certainly—

Q. Mr. Louchheim, is it— A. And certainly— THE COURT: Excuse me. Don't interrupt.

THE WITNESS: And certainly on the Medicaid there can be transportation for medical assistance. The proviso is that it [160] has to have prior approval, and for a person who goes regularly to a clinic there can be prior approval not on any given visit but on a block of visits.

THE COURT: Is it contemplated that there will be some kind of an administrative order if this change takes place?

THE WITNESS: It will be rules and regulations which the Department and the Board put out regularly.

THE COURT: And when is it contemplated that this will be done, if it is going to be done?

THE WITNESS: Well, your information is just as good as mine, your Honor, but the Legislature is planning, we are told, to adjourn either Thursday or Friday, granted they meet the clock, and so forth. As soon as we know what the legislation is, because, as you know, amendments are being considered to 131A. As soon as that is done we can put out immediately—

THE COURT: I see.

THE WITNESS: (Continuing) —information [161] to Commissioner Goldberg and others to implement the program.

THE COURT: Well, your expectations would be within a week or two, then?

THE WITNESS: Definitely.

Q. Mr. Louchheim, I ask you—I know it is very late in the day—just a few questions I think for which a yes or no answer would be sufficient: Is it a fact that however the recent cuts are distributed, cost of living changes was not the basis for them?

MR. WEINBERG: Objected to. It calls for a conclusion of law.

MR. ALBERT: No, it doesn't. It's very factual.

THE COURT: Overruled. Excuse me, I will rule.

MR. WEINBERG: It's awfully irrelevant to the question of the temporary restraining order, I should think.

THE COURT: Let the witness answer if he can. If he can't he will say so.

Read the question.

MR. WEINBERG: It's irrelevant, you Honor.

[162] THE COURT: Yes.

(Last question read.)

THE WITNESS: Do you wish me to answer, your Honor?

THE COURT: If you can.

THE WITNESS: They were based on a cost-of-living increase. They were based on a cost-of-living increase which was promulgated August 23, 1968 on the basis of which SA-1 was promulgated, and what this new legislation does, it takes the schedule of SA-1 and what it does is make a flat grant; instead of having eight or nine items let's say for a family of four, based on the eldest child, what they have done and what we did was we found out what the median age was for the child—the oldest child of the family of four, we also found what the mean age, and we found that the mean was higher than the median age, therefore we applied the mean age, and for a family of four the mean—the mean age of a child was between—was ten or eleven.

I may say that the median age was 9.6, [163] but we applied the 10.1, the 10 to 11, which gave for a family of

four \$191.00.

And then what we did was we adjusted that upwards to \$208 for New York City and \$183 for the rest of the State. And those whose children, whose oldest child was less than eleven gained, and those whose child was over eleven were adversely affected.

Q. On the regular recurring grant they gained? A. On

the regular recurring grant.

Q. Yes. A. And according to the percentages that I gave you before, as far as New York City was concerned it included the \$100 per person Cyclical.

Q. So it was based on cost of living insofar as it was based on the previous figures, which didn't themselves—
A. It was based on cost of living, it was determined—

THE COURT: Excuse me, gentlemen.

Do you want to take a break for a few moments? THE WITNESS: Not unless your Honor—

THE COURT: Then don't answer before he asks the question.

[164] Q. It was based on cost of living insofar as it was based on a previous adjustment which you say reflected cost-of-living changes at that time? A. It was based on a cost-of-living adjustment which was made subsequent to January 2, 1968.

Q. And it made an adjustment to that adjustment? A.

No, it was based on that adjustment.

Q. It changes that adjustment, wouldn't you say that?

A. Based on that adjustment.

- Q. Is it a fact that when New York State Department of Social Services has made changes such as the one last August local Social Services districts are usually given up to nine months to implement cost-of-living adjustments? A. That—I think I said nine months originally, but in your scene I think it was eight months.
- Q. Eight months is the usual time allotted? A. This was the time allotted, yes.
- [165] Q. But the document you mentioned that was submitted to HEW was a notice to HEW of the change you had made in the State plan last August, is that correct? A. Correct.
 - Q. It represents nothing more than that-correct?

MR. WEINBERG: I'm sorry, I didn't hear that. Q. Did it represent anything more than that?

MR. WEINBERG: I don't know what that question means.

THE COURT: Read the question.

(Last question read.)

THE COURT: Can you answer it?

THE WITNESS: Yes.

THE COURT: If you can-

THE WITNESS: Yes, it represents the State plan, and the State plan is the basis on which all social services must be administered in the City of—in the State of New York. The State plan includes our State plan material, and naturally it also includes our law, so it's nothing—it's—it's the basic document under which we operate.

[166] Q. I understood it was submitted to HEW as part of the State plan, just like your recent amendments were submitted to HEW now and are being questioned, is that correct? A. We received a reply from HEW regarding 131A, yes.

MR. ALBERT: May I be indulged just for a half a min-

ute, your Honor?

I have no further questions, you Honor.

THE COURT: Yes, do you have any redirect?

MR. WEINBERG: No redirect, your Honor. I would like to be heard on the temporary restraining order.

THE COURT: Well, I'd like to ask the witness, since neither of you seems to want to, what the reply was from HEW with respect to this new statute?

THE WITNESS: I'd be glad to give you a copy of the

letter, sir.

THE COURT: If you have it here I'd be delighted to see it.

MR. WEINBERG: Here it is, your Honor.

THE COURT: All right, mark it in [167] evidence and supply copies-

MR. WEINBERG: I offer it in evidence.

THE COURT: (Continuing) -to your adversary.

Stay here a moment while I look at it.

THE WITNESS: Certainly.

(Letter from HEW marked Defendant's Exhibit D in evidence.)

THE COURT: Well, has the State supplied the Depart-

ment with additional data as requested here?

THE WITNESS: The State Department of Social Services has not replied. They have made suggestions to the Governor's Office in regard to what could be modified about the rules and regulations, and so forth.

THE COURT: I see.

THE WITNESS: And as soon as the Legislative session is completed there will be a reply.

THE COURT: When do you think that will be, again within the space of a week or two?

THE WITNESS: I'd say that it could be done within at the most two weeks. I [168] personally believe it can be done within a week after the Legislative session is terminated.

THE COURT: And then-

THE WITNESS: Material has been drafted, but they have to see what's happening.

THE COURT: Yes, and then on the basis of that HEW would be able to rule on 131A?

THE WITNESS: Yes, your Honor.

THE COURT: But it's your feeling based on your discussions with your associates in Albany that it's possible for the City without unduly straining its administrative processes to make appropriate changes which would permit it to comply with the new law as amended in the last month and at the same time retain sufficient of its records so that it would be able to change back to the old system relatively quickly, I gather in the space of weeks.

THE COURT: Subject to the modifications or changes in the interim?

THE WITNESS: And two other things: If this goes—131 goes into effect, and at [169] the—after a couple of months it is determined to be unconstitutional or against HEW, it can be changed. Some people, as I have indicated, approximately, 50 per cent outside the City of New York, will have benefited in regard to the current grant.

THE COURT: Yes. But it's going to be hard to get that money back?

THE WITNESS: There will be no effort made to get it back. And those who get less will get the adjustment.

Now, in addition to that-

THE COURT: So I take it—I don't want to interrupt you, but I want to follow this: I take it then that if you go ahead with the changes and then we declare the statute unconstitutional—by we I mean the Federal Court system, not me necessarily—the total expense to the State may be substantially larger because they will have paid out these extra sums, which are really not refundable?

THE WITNESS: On the basis of your if's the answer is

yes, I agree with you.

[170] On the other hand, as I think I indicated, we have no reason to believe and we have—our experts are definitely of the impression that we do comply very definitely with Section—I have got the wrong letter here—with Section 1202(a) 23, and that, as you will see from the letter which was given to you from HEW, there are other changes which can be rectified either by a change in legislation, which is being contemplated, or by rules and regulations.

And the real question which it seemed to me that this was about was this 402(a) 23, and in my direct testimony I tried to indicate—and in my cross-examination—that we did raise standards in accordance with cost of living.

THE COURT: Thank you very much.

MR. ALBERT: Your Honor, may I just put two very quick questions to the witness?

THE COURT: Yes.

MR. ALBERT: Thank you.

[171] CROSS EXAMINATION

BY MR. ALBERT: (Cont'd)

Q. As you said, the adjustments reflect and are based upon cost-of-living adjustments of August 1968, is that correct? A. That is correct.

Q. So they are adjustments which meet the full needs making up the welfare budget, they don't reflect, in short, a decision on the part of New York to pay better percentage of need of people rather than full need as defined in your amounts used—in your amounts? A. I'm not sure I understand the question.

Q. The adjustments based on the August 1968 cost-ofliving adjustments, the recent welfare amendments based on those cost-of-living adjustments reflect, as you said, those adjustments—indeed that's why you believe they comply—and hence they represent an assessment by the Legislature of the needs of people in light of cost-of-living changes? A. The SA-1, which was promulgated August 23, 1968, was based on cost of living, which was surveyed on May of 1968 by our Department, and therefore it is based on that increase. As I indicated, the schedule under 131A was an adjustment of SA-1 to be based on a flat [172] grant in which you would use the mean of the oldest child.

Q. But still continuing to pay the full need of people, as to how you define the amount? A. Yes, but certainly if the mean age of a child on this calculation, as I indicated, is 10 or 11, and some—some family has a child 20, they are not going to get what they did under SA-1.

Q. No, I certainly appreciate that. A. An age 5 per-

son would get more.

Q. I appreciate that, of course. My second question is based on your experience with the procedure by which you submit a change to HEW and it raises questions with you; would you say that procedure is one that takes some period of time and consultation and discussion? A. This varies: Sometimes we can get much faster action from the Federal Government than the City can get from the State.

Q. And other times you can't? A. We have reason to believe, for example, as Commissioner Goldberg will remember, when they submitted the Cyclical Grant Demonstration Project we got a very quick answer. I believe that HEW is well aware of the [173] fact that this legislation goes into effect on July 1st, and if our answers to HEW are full and complete, which we believe they can be, and which we will send to them, as I have said to the Judge, within two weeks at the outset (sic) and I believe within a week, I believe we can get a very fast answer from HEW.

Q. Mr. Louchheim, what would you do if the answer from HEW in two weeks' time or a month's time was "We still don't see how that complies with 402(a) 23"?

THE COURT: Don't answer the question. Thank you very much, Commissioner. (Witness excused.)

Supreme Court of the United States

No. 540 --- , October Term, 19 6

Julia Rosado, et el.,

George K. Hynan, etc., at al.

Circuit is granted, end the The petition herein for a writ of certiorari to the United States Court of October 13 ----case is placed on the summary calendar. ORDER ALLOWING CERTIORARI. Filed Appeals for the

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

as amended by order of October 20, 1969

Supreme Court of the United States

No. 540 ----, October Term, 19 61

Julia Rosado, at al... Petitioner

George K. Wyman, etc., et

October 13, -----, 19 69. case to placed on the summery calender. The case to set for The petition herein for a writ of certiorari to the United States Court of Circuit is granted. seat with No. 131 in which jurisdiction was ORDER ALLOWING CERTIORARI. Filed Appeals for the Second orel argu And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. IN THE

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Supreme Court of the United Statem & Davis

Остовев Тевм, 1969

No. -540

Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

-against-

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION TO ADVANCE

LEE A. ALBERT

Center on Social Welfare Policy and Law 401 West 117 Street New York, New York 10027 280-4112

HENRY A. FREEDMAN
SYLVIA ANN LAW
ROBERT P. BORSODY
Of Counsel



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APPENDIX I

Order	of	the	United	States	Court	of	Appeals	
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Catheyn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

-against-

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Department of Social Services for the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND MOTION TO ADVANCE

Petitioners pray for the issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered on July 16, 1969 (45aa) vacating preliminary and permanent injunctions and reversing summary judgment entered by District Judge Weinstein (Eastern District, New York) and affirming the dissolution of the three judge district court. The judgment of the Circuit Court Judges Lumbard and Hays, Judge Feinberg dissenting, reverses the District Court orders enjoining New York from severely reducing subsistence

grants to some 850 thousand needy children and their parents under the Aid to Dependent Children program.

Petitioners also pray that this Court note the urgency of the interests at stake along with the national importance of the federal issues herein presented and advance the schedule for briefing and argument. This Petition is accompanied by an Application for Stay pending review in this Court, submitted on August 1, 1969, to Mr. Justice Harlan, Circuit Justice, and referred by him on August 20, 1969, pursuant to Rule 50(b), to the entire Court.

Opinions Below

The opinion of the three-judge district court dismissing the constitutional claim, dissolving itself, and remanding the case to the single judge is not reported, and is set forth in "Appendix to Petition for Certiorari, Motion to Expedite, and Jurisdictional Statement", Nos. 1539 and 1540, O.T. 1968, submitted to this Court last term (10a).

The opinion of the one-judge district court in support of the preliminary injunction is set forth at 14a. The District Court's preliminary injunction order is set forth at 64a. The per curiam order of the Court of Appeals staying the preliminary injunction, dated June 11, 1969, is set forth at 66a. The District Court's opinion in support of summary judgment is set forth at 39aa. The Court of Appeals opinion affirming the dissolution of the three-

¹References to the aforementioned Appendix in Nos. 1539 and 1540, O.T. 1968, are designated ——a. That Appendix contains the opinions rendered prior to the District Court's Summary Judgment and Permanent Injunction and the Circuit Court's reversal below. The later opinions are contained in the Appendix to this Petition for Certiorari and references thereto are designated——as.

judge court, vacating the injunctions, and reversing the summary judgment is found at 45aa. The Court of Appeals denial of a stay of its mandate pending application to Mr. Justice Harlan is set forth at 89aa.

Jurisdiction

The judgment of the Second Circuit Court of Appeals affirming the dissolution of the three-judge court, vacating the preliminary and permanent injunctions and reversing the summary judgment was entered July 16, 1969. The Circuit Court on July 31, 1969 denied Petitioner's motion to stay its mandate pending application for certiorari to this Court. Jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1), 2101(c) & (f).

Questions Presented

In January, 1968, Congress ordered the states to adjust by July 1, 1969, their standard of need in the AFDC program to reflect fully changes in living costs since the time of last adjustment and to adjust proportionately any maximums then imposed on the amount of aid paid to families with dependent children. To reduce overall AFDC expenditures by 75 to 100 million dollars in fiscal year 1969-70, the New York Legislature in March, 1969, severely reduced the AFDC standard of need, and consequently the amount of aid paid in response to "the spiraling rise of public assistance rolls and the expenditures therefore," such reductions to be implemented by July 1, 1969. Section 131-a, New York Social Services Law. On April 10, Petitioners, on behalf of themselves and the 850,000 moth-

ers and children in New York dependent on AFDC, brought suit in the United States District Court to enjoin implementation of the welfare cutback on the ground that it offended the federal command, Section 402(a)(23), on which New York's use of federal AFDC monies is conditioned, and on the ground that the even greater reductions for the metropolitan counties outside New York City of. fended the Equal Protection Clause of the Constitution. A temporary restraining order was entered and a threejudge court quickly convened, which, after final submission on both claims and finding the Constitutional claim substantial, dissolved itself on the ground that the Constitutional claim was moot and unripe in light of the Respondent Administrator's discretionary power, then unexercised, to rectify the discriminatory schedules then being implemented. The single district judge on remand found that the reduced schedules did violate the federal statutory command and enjoined its final implementation. The Circuit Court found that the Federal District Court was in these circumstances without jurisdiction to adjudicate the controversy.

- 1. Under this Court's decision in King v. Smith, 392 U.S. 309 (1968), is a justiciable controversy presented where recipients of Aid to Families with Dependent Children seek to redress injuries caused to them by the failure of state officials to comply with the fundamental plan conditions of the federal Social Security Act while continuing to accept the substantial federal funds given in exchange for a commitment to comply with these conditions?
- 2. Does a United States District Court abuse its discretion in adjudicating a substantial and urgent federal

statutory claim which is plainly pendent to a concededly substantial Constitutional claim under 42 U.S.C. §1983 and 28 U.S.C. §1343, because the vindication of the federal claim is likely to entail additional state expenditures or because the Department of Health, Education and Welfare, with its views before the court as a party amicus, has the unused authority to order cutoff of federal funds?

- 3. Does a substantial Constitutional claim properly brought under 42 U.S.C. §1983 to enjoin administrative implementation of discriminatory schedules become moot and unripe because the Defendant Administrator has discretionary administrative authority, wholly unexercised, to rectify the challenged discriminatory schedules being implemented?
- 4. May New York severely reduce "the amounts used to determine the needs of individuals" on July 1, 1969, whilst participating in AFDC, where Congress has ordered the states to adjust such amounts to reflect fully cost of living changes and afforded the states 18 months to make the necessary legislative and administrative adjustments by July 1, 1969?
 - 5. Does the United States District Court have jurisdiction under 28 U.S.C. §§1343(3) or (4) to adjudicate the claim that Respondents have wrongfully deprived these needy children and families of rights secured by the Social Security Act, 42 U.S.C. §60.1 et seq., and to hear the cause of action created by 42 U.S.C. §1983 for the protection of Petitioners' rights under that federal Act?

⁽²³⁾ provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will

have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part:

Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

§5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

\$131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section. less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one. exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
\$70	\$116	\$162	\$208	\$254	\$297	\$340

For each additional eligible needy person in the household there shall be an additional allowance of fortythree dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One	Two	Three	Four	Five	Six	Seven
\$60	\$101	\$142	\$183	\$224	\$257	\$290

For each additional eligible needy person in the household there shall be an additional allowance of thirtythree dollars monthly.

- 4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.
- 5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.
- 6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance

who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. —, L. 1969 (May 9, 1969) of the State of New York provides:

Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nine-teen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:

- 4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.
- §3. This act shall take effect July first, nineteen hundred sixty-nine, except that section two of this act shall take effect immediately.

Statement of the Case

Recognizing that the federal purpose of protecting the economic security and well being of needy children through Aid to Families with Dependent Children (AFDC) was being undermined by disturbingly inadequate grants in all states and that even further reductions were likely as the numbers of children eligible for aid increased, Congress in January 1968, imposed a significant federal requirement on the states toward "increasing income of recipients of public assistance." Sen. Rep. 744, 90th Cong., 1st Sess. (1967). Congress departed from the 32-year old policy of allowing states wide latitude in determining standards of need and amounts of payment under AFDC, see King v. Smith, 392 U.S. 309 (1968), and mandated that by July 1, 1969 the states participating in AFDC increase their standard of need in force on January 2, 1968 to reflect fully changes in living costs since those standards were last established, and to adjust grant levels accordingly. Section 402(a)(23), P.L. 90-248, Social Security Amendments of 1967, 42 U.S.C. \$602(a)(23).

The federal statute, on its face and from its legislative evolution, represents a modest interim step pending more fundamental reform, a stop-gap against injury to children and family integrity as a result of inflation and foreseeable further deterioration in grant levels. In it Congress sought to stabilize prevailing grant levels during a period of national consideration of more comprehensive changes in our national welfare system affecting disadvantaged families. Since increases were required to reflect the spiraling cost of living the states were allowed ample

time to July 1, 1969, to make the necessary legislative and administrative adjustments² (45a-49a).

The cost of living rose in New York 10.1% from the time of the last adjustment of AFDC need standards in May 1968, to July 1, 1969. Rather than increasing grants to keep pace with inflationary living costs, the New York legislature, in March, 1969, repealed a long-standing authorization to Respondent to make yearly increases for rising living costs and to set grant levels "in accordance with standards of health and decency in the community." New York Social Services Law §131, L. 1940, c. 619 §7, amended by L. 1950, c. 364 §2. Instead, the legislature itself established a reduced statutory schedule of grants based on the "costs of delivering the needs of recipients," and in explicit response "to the spiraling rise in welfare rolls and the expenditures therefor." New York Social Services Law §131-a, L. 1969, c. 184 (March 31, 1969) (hereinafter Section 131-a). As the Governor described the Act: "My proposal for limiting public assistance and care payments . . . will include elimination of the non-recurring special need grants [and] reduction of public assistance eligibility standards. . . . " s

The Governor initially proposed an across-the-board 5% cut in all State expenditures for the 1969-1970 fiscal year. While cuts in most other areas were restored, the budget for AFDC was reduced even further by at least

² "The only reason why the delayed effective date is necessary is to give States an opportunity to change their state plans without taking away from them in the meantime the federal matching funds." 113 Cong. Rec. p. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

^{*}Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970, at p. 14. Doc. No. 48.

13% from projected expenditures at then-prevailing levels (38a-41a). This reduction in the State's share of AFDC compels a corresponding reduction in the local 25% and federal 50% shares, amounting in total to a reduction of 75 to 100 million dollars. The budget cuts are accommodated by statutory grant schedules severely reducing the amounts afforded to meet the needs of families with older children, particularly teenage children, and abolishing entirely amounts to meet such basic needs as clothing and home furnishings for all recipients in the State and school lunch allowances and such urgent or special needs as diets for diabetics and cardiacs and medically-dictated telephones. For recipients outside of New York City, the legislative reductions are even greater (31a-36a). These reduced schedules were to be administratively implemented across the state as soon as feasible, on July 1, 1969.

Pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), and 28 U.S.C. §1331, this action was instituted on April 9, 1969, by ten needy families on behalf of themselves and 850,000 other parents and children wholly dependent on AFDC for the rudiments of life. It sought to adjudicate in a federal district court the validity vel non of the reduced statutory schedules and to enjoin the Respondent from proceeding to implement them on the ground that the severe reductions violate Section 402(a)(23) of the federal Social Security Act, as amended 1967, 42 U.S.C. §602(a)(23), which requires that all states participating in AFDC:

[&]quot;... provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and

any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted;"

Petitioner's second claim was that the even greater legislative reductions then being implemented in the metropolitan counties outside New York City, where living costs are assuredly comparable to costs in the City itself, violate the constitutional guarantee of equal protection and the Social Security Act requirement of statewide uniformity and equality of treatment for needy persons, 42 U.S.C. §602(a)(1) and (3).

Since a substantial constitutional challenge to a statewide statute was presented, a three judge court was quickly convened. District Judge Weinstein found, after several hearings, that the potentially dispositive pendent federal statutory claim should also be referred to the three-judge court, in accordance with the normal procedure, particularly since "all parties agree that time is of the essence," (7a). "A three-judge court appears to be the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible" (7a). Florida Lime and Avocado Growers v. Jacobsen. 362 U.S. 73 (1960); Brotherhood of Locomotive Engineers v. Chicago, Rock Island and Pacific Ry., 382 U.S. 423 (1966). A temporary order was quickly issued on the basis of the "extensive briefing, affidavits of the individual plaintiffs, and experts' testimony" showing that, in view of the impoverished circumstances of the plaintiffs, the reductions would cause irremediable harm (7a). The order restrained the Respondent from taking irreversible steps toward implementing the statewide reductions. The three judge panel, Circuit Judge Moore and District Judges Weinstein and Mishler, found that it was properly convened, continued the restraining order, and considered extensive testimony, affidavits, statistical material and charts, official documents, briefs and arguments. Submission of evidence and argument before the three judge Court on cross motions for summary judgment on both the constitutional and statutory claims were completed on May 2.

On Friday, May 9, during the closing hours of New York's 1969 Legislative session, the Respondent obtained administrative power to increase the statutory grant levels for counties outside New York City by some uncertain amount upon some unspecified showing by the county legislature or finding by the Respondent Administrator that the costs of items were higher than those reflected in the statute. New York Social Services Law §131-a(4), as amended (May 9, 1969). The lower statutory levels were to be implemented absent the exercise of this wholly discretionary power, and the increases could not be higher than the reduced levels set for New York City. Petitioners were unaware of this change, when on Monday, May 12, the three judge Court, without notice or an opportunity for hearing, ruled per curiam that although it was properly convened to hear the case, the substantial constitutional issue had been rendered moot or unripe by this, then unexercised, administrative discretion. It remanded the case to the District Judge for appropriate proceedings.4 Petitioners

^{*} The three judge Court conceded that petitioners had no administrative remedy before the state agency to compel the exercise of this discretionary power and hence even suggested that petitioners

promptly moved to be heard before the three judge Court and questioned the dismissal of a substantial constitutional claim because of unexercised administrative discretion in a suit properly brought under 42 U.S.C. §1983. That motion was pending until June 5, the day after final argument in the Court of Appeals, when it was denied. Since the evidence and argument before the three judge Court on both claims had been extensive and exhaustive, upon remand, Judge Weinstein immediately transformed the restraining order into a preliminary injunction to allow the Respondent to pursue an interlocutory appeal. Judge Weinstein requested further information about the evolution of the State AFDC estimated budget, as the predicate for summary judgment and entered an all but dispositive 64-page opinion in support of the preliminary injunction.

Judge Weinstein carefully considered the jurisdictional question. He found that: federal jurisdiction initially existed over both the constitutional and the pendent statutory claim; "[o]nce pendent jurisdiction attaches, a federal court has power to decide the entire case (17a);" and, to abstain from deciding the pendent claim would be "entirely inappropriate, wasteful of judicial energy and dangerous to the litigants (19a)." He found the exercise of

In regard to the dissolution and the statutory claim, the threejudge court concluded with the impenetrable statement:

seek mandamus in the state courts, though the Respondents' duty under the statute was plainly discretionary (12a).

[&]quot;We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged Constitutional issue or after it decided the Constitutional issue against the Plaintiffs. Cf., King v. Smith, 392 U.S. 309, 312, n. 3 (1968). Under the circumstances of this case, there is no reason for continuing the three-judge court" (12a).

federal jurisdiction compelling for several reasons. First the pendent statutory claim was not based on state law, but "poses crucial and important questions of federal statutory law," involving "the fundamental rights of children" and "the expenditure of billions of dollars in federal monies" (19a). Second, "(J)udicial economy, convenience and fairness to litigants . . . compel retention of jurisdiction. Speedy final determination . . . is essential to both parties . . . " (19a-20a). Finally, the expenditure of time and effort by the litigants and the Court had been enormous and "would be, to a large extent, wasted were all these materials to be offered anew in a state court" (20a). Judge Weinstein also found that there was general federal question jurisdiction under 28 U.S.C. §1331, since the uncontroverted evidence showed that the reductions in grants would likely result in severe immediate and permanent injury to the children's "mental and physical development" (22a). He did not reach the question whether 28 U.S.C. \$1343(3) and (4) provided an independent basis for jurisdiction of the Social Security Act claim (25a).

The Department of Health, Education and Welfare, the City of New York, and Nassau County were before the District Court throughout these proceedings as amici curiae and, although the localities' financial interest is equal to the State's and the federal government's is twice as large, none interposed any objection to the course of proceedings or the relief sought. The Respondents sought to have H.E.W. joined as a party defendant, which effort was "strenuously opposed" by the federal agency (3a). H.E.W.'s views were before the District Court in the form of a regulation under Section 402(a)(23) and an extensive brief submitted in a companion case. Despite the known

requirement of Section 402(a) (23) New York did not seek the advice or approval of H.E.W. before enacting in final binding legislative form the reduced standards of need and amount of aid to be paid. On April 16, James Callison, the Regional Commissioner of H.E.W., informed the Respondent that "Section 131-a of New York's Social Services Law... will raise a question of conformity with the federal requirements unless the State can establish [facts showing a living cost adjustment]." The Respondents have not yet deigned to reply to the questions raised by the federal agency. There has been no further action by H.E.W.

On May 21 the Court of Appeals granted Respondents' motion to expedite the interlocutory appeal, each party being afforded approximately one week for briefing, the case having been fully developed below. Argument before a specially designated Circuit Court panel, Chief Judge Lumbard, Judge Hays and Feinberg, was had on June 4, when the Court denied the request for a stay of the injunction, stating that a final decision would be rendered forth-

^{*}As this Court has observed, "raising questions" is the H.E.W. euphemism for disapproving a state plan condition, without invoking the sanction of cutoff of federal funds. See King v. Smith, supra, at ns. 11 & 23.

^{*}Circuit Judge Moore, the presiding judge on the three-judge district court panel was designated to sit on the appellate panel along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and expedition. To avoid further complexities and insure a validly constituted panel, Petitioners reluctantly brought 28 U.S.C. §47 to the attention of the Circuit Judges. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

Section 47 provides:

[&]quot;Disqualification of trial judge to hear appeal."

[&]quot;No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

with. On June 11 the Court of Appeals sua sponte granted the stay without opinions, Judge Feinberg dissenting. On June 16 the Circuit Court denied Petitioners' motion for a final order so that expedited proceedings could be sought immediately in the Supreme Court; it also denied the motion to vacate the stay. On June 16 New York supplied the District Court with the limited information which the court had requested on May 15th. On June 18, without need of further hearing or argument, Judge Weinstein issued a summary judgment and permanent injunction for Petitioners based largely on the extensive data submitted to the three judge Court, which data was found to be "consistent so far as legally relevant." Judge Weinstein found that the New York State statute effects "drastic cuts in both the standard of need and level of payment . . . in violation of the Congressional mandate embodied in 402 (a) (23) . . . " (39aa). The decrease in total AFDC payments under the New York State program is "no less than \$75,000,000," of which the state's share is "approximately 30%" (43aa). New York's appeal was immediately consolidated with the pending interlocutory appeal and the permanent injunction was stayed without hearing on June 19.

On July 16 the Court of Appeal issued three opinions, Chief Judge Lumbard and Judge Hays separately finding

The was in this posture that the Supreme Court was asked in the final days of the October 1968 term to grant immediate review before judgment of the Circuit Court, and to vacate the stay, the latter application having been made to Mr. Justice Harlan and referred by Mr. Justice Brennan to the full Court. This Court denied Petitioners' motions and dismissed the appeal for lack of jurisdiction on June 24, Mr. Justice Douglas and Harlan not participating. Rosado v. Wyman, —— U.S. —— (1969). The Petitioners thereupon filed in the Circuit Court an appeal from the order of the three-judge court, which was consolidated with the two appeals then pending.

for a variety of alternative, sometimes conflicting, reasons that the federal court was without authority to decide the Social Security Act claim.8 Judge Hays found that the federal district court had no jurisdiction to hear the pendent statutory claim. His view was that judicial power rests in individual judges rather than in the District Court, and "[s]ince the single judge at no time had jurisdiction over the constitutional claim, there was never a claim before him to which the statutory claim could have been pendent" (51aa). He considered the three judge court's apparent effort to remand the pendent claim to the single judge futile "since with the dissolution of the three judge court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power" (51aa). Judge Lumbard expressly disagreed with this ruling (62aa). But he found, and Judge Hays seemed to agree, that the District Court had abused its discretion in exercising jurisdiction over the pendent federal claim, since H.E.W. had not taken final action by condemning the New York Statute and cutting off federal matching funds, and since the "practical effect" of the District Court's vindication of the federal claim would likely be to increase State expenditures (63-65aa, 51-53aa). Neither opinion suggests that the suit was barred by the traditional standards of primary jurisdiction, exhaustion of administrative remedies, or the Eleventh Amendment. Rather the factors relied on are said to make out an abuse of discretion on the part of Judge Weinstein in resolving the federal issue. Judge Lumbard also observed that decisions of such large import

^{*}U.S. Law Week observes that "The only thing that two judges can fully agree upon is that the single judge should not have exercised jurisdiction." 38 USLW 1023 (Aug. 5, 1969).

are better made by three judges rather than one, although both Circuit Judges expressly affirmed the three-judge court ruling dissolving itself and remanding the statutory claim to the single judge (50aa, 62aa).

Not resting on this plethora of jurisdictional rulings alone. Judge Hays went on to consider the merits and ruled that despite the comprehensive statutory language requiring a repricing adjustment to both the "amounts used by the State to determine the needs of individuals" and a proportional adjustment to "any maximums that the State imposes on the amount of aid paid," neither federal requirement had any application to the State of New York. He found that since New York had once increased the amounts used to determine needs in May, 1968, after the federal statute was enacted, the State was then free to abolish these increases either before or after July 1, 1969. The first part of the federal statute requires no more than a momentary repricing of the standard of need by July 1, 1969. Contrary to all existing interpretations of 402(a)(23), including H.E.W.'s, Judge Havs found that the second part of the federal statute only applies in states which impose an arbitrary cutoff on the amount which a family may receive regardless of family size, these maximums being the subject of recent Constitutional invalidations under the Equal Protection

Judge Hays found main support for dissolution in the Respondent's later administrative adjustment of grant levels in the metropolitan counties outside New York City, albeit without noting that the discretionary adjustment left the equal protection attack exactly as it was at the outset of this lawsuit. The amended schedules have subsequently been found unconstitutional in regard to Aged, Blind and Disabled recipients by a unanimous three-judge court. Rothstein v. Wyman, — F. Supp. — (S. D. N. Y., Civ. No. 69-2763, Aug. 4, 1969).

Clause (57-60aa). Judge Lumbard did not express his views on the substantive issue. Both judges summarily rejected, but for different reasons, the claim that 28 U.S.C. §1343(3) & (4), in conjunction with 42 U.S.C. §1983, provided an independent basis for jurisdiction (55aa, 64aa).

Judge Feinberg vigorously dissented from the jurisdictional rulings of the majority under which "the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute," and which allow "New York to receive millions of federally granted dollars and then proceed to ignore the federal law" (77aa, 65aa). He found that even though the three judge court could have more properly decided the pendent statutory claim before it, the single district judge had jurisdiction to decide the statutory claim after the remand from the three judge court. He found unpersuasive the reasons which the majority offered for their finding that Judge Weinstein had abused his discretion in retaining jurisdiction, and agreed with the district judge that the factors supporting the exercise of federal jurisdiction were compelling. He extensively considered the substantive issue, rejected Judge Hays' construction as making "a mockery of congressional purpose" and fully supported the conclusions of the district court (77aa).

¹⁰ Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969); Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969); Westberry v. Fisher, 297 F. Supp. 1109 (S.D. Me. 1969).

Reasons for Certiorari

1. The substantive question partially avoided below involves the application and timely enforcement of a significant provision in a federal regulatory program of nation-wide scope affecting the welfare of 6.2 million dependent children and their parents and the expenditure of 2.7 billion dollars in federal and state monies.11 The rights founded on this provision in this case—the right of 850,000 needy dependent children and their parents in New York to receive a modest increase rather than an immodest decrease in subsistence grants-are fundamental. Even a slight increase in welfare grants is of critical importance to a family living on the borderline of subsistence; any decrease threatens the health and well-being of these vulnerable families. The divided Circuit Court leaves undisturbed the findings that the New York Statute affects "drastic cuts in both the standards of need and level of payments" (39aa) and that such cuts "threaten injuries to children's physical and mental development . . . [and] may irreversibly retard mental and physical development" (22a). The severity of the cutback, and the harms flowing therefrom, are well documented in the opinions and the extensive record in this case.

The national legislative policy expressed in 402(a)(23) renders expeditious and authoritative enforcement imperative. The provision is not a comprehensive solution to the well-recognized inequities in our national welfare system, including the wide variations among the states, exclusion

 $^{^{11}}$ January 1969 figures from Welfare in Review, 1969, Volume 7, No. 3, Table 7.

of certain classes of needy families and the below subsistence levels of grants in all states. Congress in 1967 postponed such a solution to the overall problem. But it took a significant interim step to prevent foreseeable further deterioration in grant levels in response to rising AFDC caseloads by stabilizing grant levels prevailing in January 1968 and requiring one modest inflationary adjustment by July, 1969. There can be little doubt that Congress fully appreciated the language, import and effect of Section 402(a)(23) as finally enacted.

The statute, for one, represented a self evident departure from the tradition of no federal control over state need standards and grant levels, see King v. Smith, supra, a departure which was obviously apparent to the committees and the entire Congress. Two, the language of the basic repricing requirement remained practically identical throughout the legislative evolution in the committees versed in public assistance administration.¹² Three, in adopting the requirement of one overall cost of living increase, while declining to accept the companion proposals, Congress made a choice of goals which is free from ambiguity. Four, in using the comprehensive term "the

The respective committees were the Senate Finance Committee and the House Committee on Ways and Means, both responsible for Social Security Act litigation and intimately familiar with

both the Act and the details of AFDC administration.

See, S. Rep. No. 744, 90th Cong., 1st Sess. at 293 (1967); U.S. Code, Cong. & Admin. News, 2834, 2840, 3132, 3179, 3208-09, 5156, 5455, 5501 (1967); Senate-House Conf. Rep. No. 1030, 90th Cong., 1st Sess.; 133 Cong. Rec. 16701 (1967).

The legislative evolution is extensively set forth in the opinions of Judge Weinstein and Judge Feinberg in the instant case and the opinions of the three-judge courts in Lampton v. Bonin,—
F. Supp.—— (E.D. La. Civ. No. 68-2092-E, 1969), and Jefferson v. Hackney,—— F. Supp.—— (N.D. Texas, Civ. No. 3-3012-B-3-3126-B, 1969), which are submitted for the convenience of this Court along with this Petition.

amounts used by the State to determine the needs of individuals" and going on to require adjustment of "any maximums that the State imposes on the amount of aid paid to families," Congress left little room for evasion or nullification. Five, in making the pricing adjustment a plan condition for continued participation in AFDC and allowing ample time for the necessary state legislative change and appropriation, Congress unequivocally expressed its intention to compel the states to raise AFDC payments.¹³ New York, a leadership state in welfare programs, has responded to rising caseloads in the one manner Congress forbade. In so doing it has ignored the plain language of 402(a)(23), the applicable H.E.W. regulation, ¹⁴ as expounded in briefs

¹⁸ See, 113 Cong. Rec. 16817 (Daily Ed., Nov. 20, 1967) (Remarks of Senator Harris).

¹⁴ The initial H.E.W. regulation issued on February 8, 1968, immediately after enactment of 402(a)(23), merely restated the language of the statute. Handbook of Public Assistance Administration, Pt. I, Section 1200. H.E.W.'s State Letter of January 22, 1968, entitled "Limitation on Federal Sharing in AFDC—P.L. 90-248" informed that "states should be aware of provisions in the Social Security Amendments of 1967 which may make more individuals eligible, such as the requirement . . . for updating AFDC assistance standards and payment maximums—effective July 1, 1969."

The current H.E.W. view was first promulgated in a later regulation, July 17, 1968, which states:

[&]quot;In the AFDC plan, provided that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a) (3) (viii) of this section. Nevertheless, if a State

filed by the United States in two other cases, ¹⁵ and the not unplain Congressional history. Such backsliding is in the teeth of an immediate national legislative policy requiring stability and some progression pending further overall reform. It is obvious that if the federal provision is to effect Congressional will and prevent the very evils Congress sought to avert, it must have effect immediately, not six to twelve months hence.

2. Section 402(a)(23) represents a notable departure from past federal policy, see King v. Smith, 392 U.S. 309. 318-19, 334, and of course has an impact on the autonomy of all the states in administering AFDC. The impact is largely financial and indeed, this fact played a decisive role in the determination of the Circuit Court that the federal court should refuse to adjudicate the Social Security Act claim. In light of the well-known problems of enforcement of federal AFDC requirements, it is not surprising that the federal statute is being ignored by the states and enforcement problems are acute. Severe controversy has arisen over the meaning of this provision and its enforceability; the provision has been extensively examined in the opinions below, the final decisions of two statutory three judge district courts in Texas and Louisiana, a regulation of the Department of Health, Education and Welfare, and the briefs of the United States in these cases.

maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standard." 45 C.F.R. 233.20(a) (2) (ii), 34 Fed. Reg. 1394.

¹⁵ Lampton v. Bonin, supra, Jefferson v. Hackney, supra.

The constructions in the Louisiana and Texas cases, both of which are on their way to this Court, and the contrasting result in the instant case, make plain the need for prompt authoritative review in this Court. A unanimous statutory three-judge court in Texas has held that that state's failure to adjust grants upward and the imposition of a percentage reduction on the standard of need violate Section 402(a)(23). Jefferson v. Hackney, supra. That court read 402(a)(23) to require repricing of the state standard need in force in January, 1968, the date of enactment of 402(a)(23), to account fully for the increase in living costs from the time of last prior adjustment to July 1, 1969; and also to require proportionate adjustment of any maxima utilized by the state in January, 1968. The Section was construed to forbid the state from failing to pass on the increase to recipients by paying a lesser percentage of need through the imposition of a percentage reduction. The court reasoned that a percentage reduction imposed on the adjusted need standard results in a dollar maximum, and 402(a)(23) requires an upward adjustment to "any maximums that the State imposes on the amount of aid paid." This is the construction endorsed by District Judge Weinstein and Circuit Judge Feinberg in this case and by dissenting Judge Cassibry in Lampton v. Bonin, supra, the Louisiana case. The majority in Louisiana agreed that Section 402(a)(23) requires an increase in the need standard and a proportionate increase in any dollar maxima employed in January. 1968. But the divided court, with doubts, adopted the H.E.W. view that a state may avoid actually increasing grants by paying a lesser percentage of the state's need standard through the imposition of the percentage factor.

The H.E.W. Regulation, 45 C.F.R. 233.20(a)(2)(i), 34 Fed. Reg. 1394, requires full adjustment to the need standard in force in January, 1968, and proportionate adjustment to any dollar maxima then used. It also forbids the creation or reduction of any such dollar maxima to avoid passing on the increase. But H.E.W. would allow states to utilize a percentage reduction on the theory that since a percentage reduction is not itself a "maximum" requiring adjustment under 402(a)(23), the statute does not literally address itself to that device. Therefore, H.E.W. would allow states to do what they will with percentage factors.

As pointed out in Jefferson v. Hackney, supra, this reasoning ignores that the percentage factor, although not itself a maxima, upon application to the need standard directly results in placing a dollar maxima on the amount of aid paid. By definition, a maxima is a dollar amount less than that represented by the state defined need standard. Accordingly, if the percentage factor utilized in January 1968 is retained, it will automatically reflect the required adjustment to the need standard in the amount of aid paid. Of course, the percentage factor need not itself be adjusted. That hardly implies that the statute allows the percentage factor to be manipulated to create a lower dollar maxima than that dictated by the situation prevailing in January, 1968, and the required repricing thereafter.

New York, along with twenty-eight other states, does not utilize maxima of any kind but pays its standard of need in full. The policy of paying the full amount of the state standard of need is continued in Section 131-a which provides that the reduced grant schedule "shall be deemed to make adequate provision for all items of need." Hence,

New York has reduced the amounts used to determine need. Contrary to all of the above authorities, this reduction passes muster under Judge Hays' construction of \$402 (a)(23). In his view, 402(a)(23) requires one adjustment to the need standard sometime between January 2, 1968 and July 1, 1969, after which the state may transform its need standard upward or downward as it sees fit. For the statute does not require any state "to increase its AFDC payments or to refrain from decreasing them" (58aa). The required adjustment to "any maxima," according to Judge Hays, applies only to "family maxima" which are utilized in a few states to limit aid to large families. He finds support for this view not in the legislative history of the statute or the administrative usages of the federal agency but curiously in the fact that family maxima have been determined unconstitutional per se in several cases decided well after the enactment of 402(a)(23). Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969), Dews v. Henry, 297 F.Supp. 587 (D. Ariz. 1969), Westberry v. Fischer, 297 F.Supp. 1109 (S.D. Me. 1969). Although evincing considerable sympathy for state autonomy in the use of federal monies, this construction imputes to Congress an intent to require that states undertake considerable legislative and administrative adjustment before July 1, 1969. which will have no effect before or after that date. There is no attempt to explain this required exercise in futility.

These cases reveal the full range of disputed interpretations of 402(a)(23). As we have seen, there are some important differences between them. Unlike Texas and Louisiana, New York meets need in full and consequently effected its reductions by reducing the amounts used to determine need. H.E.W. has defended the percentage reductions while "questioning" the New York cutback and explicitly forbidding this method in its regulation and briefs submitted in Louisiana and Texas. The relief requested in New York was to prevent implementation of a severe cutback, while in the other states increases in grants were sought, and in Texas this relief was granted. The statute affecting large numbers of needy children and the administration of considerable federal monies has been explored and debated at length in these cases. This obviously important and disputed statute awaits the construction of this Court.

3. The jurisdictional rulings partially relied upon below not only "allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them" (65aa) but pose far-reaching questions on the justiciability of a Social Security Act claim in a United States District Court. The variety of diverse, and often conflicting, rulings and the separate opinions of Chief Judge Lumbard and Judge Hays are set forth seriatim in the Application for a Stay accompanying this Petition. Only the more significant ones will be discussed here.

Both Judges Lumbard and Hays held in separate pinions that a federal court abuses its discretion in deciding a Social Security Act claim pendent to a substantial Constitutional claim, where a likely effect of vindicating the federal claim is to entail substantial state expenditures. Since most all Social Security Act claims affect large numbers of people in New York and all other states, such a ruling effectively bars adjudication in a federal court.

Increased expenditures are one possible, or indeed likely. result whenever the Constitution or Social Security Act require expanded eligibility, King v. Smith, supra, Shapiro v. Thompson, 394 U.S. 618, or increased grants, Dews v. Henry, supra, Williams v. Dandridge, supra, Westberry v. Fisher, supra. This is not an Eleventh Amendment problem and there is no viable precedent for allowing a federal court to pick and choose among the plan conditions of AFDC on the basis of its views on which ones are more or less onerous to the states. See Seward Machine v. Davis, 301 U.S. 548, 594, 614 (1937). Congress prescribed 402(a)(23) as a plan condition for continued participation in AFDC, just as it prescribed plan condition 402(a)(9), now (a) (10), which was enforced by this Court in King v. Smith. Surely 402(a)(23) is no more or less enforceable because of the extent or character of the violation being challenged thereunder.

Both Judges also held that a federal court abuses its discretion in deciding a pendent Social Security Act claim where the matter is "pending" before the Department of Health, Education & Welfare, which "is far better equipped than the federal courts to review an alleged inconsistency between" the state and federal statutes (53aa). The effort to avoid King v. Smith on the ground that in King "H.E.W. had already given notice to the state that its regulation did not conform" (64aa), treats rather lightly this Court's explicit observation in King that "Alabama's substitute father regulation has been neither approved nor disapproved by H.E.W." King v. Smith, 390 U.S. 309, at n. 11. See also, n. 23. As this Court recognized in King v. Smith and Damico v. California, 389 U.S. 416, there is no rule of exhaustion, primary jurisdiction, or discretion,

where the aggrieved party seeking adjudication has no power to invoke or participate in any administrative process, Frozen Food Express v. United States, 351 U.S. 40. Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407; or where the administrative remedy is wholly inadequate to protect the right asserted, Monroe v. Pope, 365 U.S. 167, McNeese v. Board of Education, 373 U.S. 668. Similarly, primary jurisdiction cannot support outright dismissal where the agency cannot grant the relief requested, where the Court is not bound by the agency determination, and where the interim harms are grievous. Thompson v. Texas Mexican Railway, 328 U.S. 134; General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422; United States v. Philadelphia National Bank, 374 U.S. at 353-354; Pan American World Airways Inc. v. United States, 371 U.S. 296. Such a result is particularly indefensible where, as here, the agency is a party amicus with its views before the court in a regulation and brief.

Where there is neither an administrative remedy nor primary jurisdiction for the complainant to invoke, it is obvious that the withholding of relief is, however named, a ruling that the matter is not justiciable, now or later, in a federal court. The litigant is simply powerless to obtain relief before any forum. There is no question of ripeness or standing in this case, since Petitioners are clearly being harmed now by the challenged law. The plurality opinions have simply denied the justiciability of Social Security Act claims within the Second Circuit¹⁶ and denied

Indeed, in the recently decided case of Rothstein v. Wyman, supra, the three-judge district court declined to rule on the Social Security Act uniformity claim because that matter was "pending" before H.E.W.; hence, the court granted relief on the parallel claim founded on the equal protection clause of the Constitution.

Petitioners any forum for vindication of their federal rights. King v. Smith does not endorse this result and the issue is one of vital import to the public interest and the interests of our nation's most needy and vulnerable citizens.

4. The ruling of the plurality that it is proper for a three-judge district court to dismiss a substantial Constitutional claim because of discretionary administrative authority to adjust the challenged provision is also an issue of importance. This too is to require exhaustion of an administrative remedy which is not available to the litigant, but here in regard to a Constitutional claim concededly brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. \$1343. The rubric of mootness or ripeness is relied on to ignore McNeese v. Board of Education, supra, Damico v. California, supra and King v. Smith, supra. But it needs little authority to recognize that a Constitutional claim does not become moot or unripe because of unexercised administrative discretion to correct the wrong complained of: such exists in every challenge to an administrative regulation and in every case where there is an administrative remedy. Judge Hays, however, finds support in the retrospective view that the Respondent Administrator did in fact make some adjustment to the schedules after dismissal. If this be relevant, then it may be noted that the administratively adjusted schedules have been enjoined by a unanimous three-judge court as a violation of equal protection for recipients of the Aged, Blind and Disabled in Nassau County and other surrounding metropolitan counties. Rothstein v. Wyman, supra. Because of the dismissal in this case, however, the recipients of AFDC in these counties do not receive the protection of this injunction. The substantial question of the constitutionality of territorial discrimination against recipients of AFDC remains unanswered, and considerable confusion is injected into judicial standards for determining when any constitutional challenge to a provision subject to administrative correction is timely.

5. Without pausing to discuss the propriety of dissolution after hasty disposition of the Constitutional claim at a very late stage of the law suit, the plurality below whipsaws the ouster of the constitutional claim into a holding that the District Court ceased to have jurisdiction upon remand. The novelty and implications of this ruling must be considered particularly in light of the fact that the pendent statutory claim is one arising under the supremacy clause of the United States Constitution and a federal statute. The claim is as federal as the equal protection claim to which it is pendent. To our knowledge, there is no decision, dictum, or suggestion of this Court or any other federal court over a course of almost two centuries that there may be circumstances in which a United States District Court should decline to exercise jurisdiction over a substantial federal cause of action.17 This Court's decisions are quite to the contrary. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); King v. Smith, supra. So too, are the decisions of the

of the United States, 9 Wheat. 738, 740 (1824), "All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws." See also, H. Hart & H. Wechsler, The Federal Courts and the Federal System (1953), at 727.

lower federal courts under the Social Security Act.¹⁸ Although the answer seems clear, we submit that this question too is worthy of review in this Court.

6. Finally, there is the question this Court alluded to as an open one in King concerning the circumstances in which "suits challenging state administrative provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." King v. Smith, supra, at n. 3. Although that question is the subject of considerable scholarly attention, e.g., Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 85 (1967), and of profound importance to recipients of AFDC, it is disposed of below on the ground that the Defendant Administrator is not a "person" within 42 U.S.C. \$1983 and 28 U.S.C. \$1343 because the gravamen of the attack is on a state statute and on the ground that the claim is without "Constitutional overtones." This ignores that state officials charged with implementation and enforcement of state statutes have long been appropriate persons in suits founded upon the Constitution and federal law, Ex parte Young, 209 U.S. 123, 160 (1908); Georgia R.R. v. Redwine. 342 U.S. 299 (1952), and that the supremacy clause is a part of the United States Constitution.

The question is not so simple. Suits founded upon the Social Security Act against state officials acting under

¹⁸ See, e.g., Solmon v. Shapiro, — F. Supp. — (D. Conn. 1969) and Lewis v. Stark, — F. Supp. — (N.D. Calif. 1968) in which three-judge federal courts heard constitutional and pendent claims under the H.E.W. substitute father regulation. Lampton v. Bonin, supra, Jefferson v. Hackney, supra, constitutional claims and pendent claims under 42 U.S.C. §602(a) (23); Doe v. Schapiro, — F. Supp. — (D. Conn. 1969).

color of state law are literally and functionally within 42 U.S.C. §1983, which provides that:

"Every person who under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . in an action at law, in suit in equity or other proper proceeding for redress."

The section thus creates a federal cause of action for claims based upon rights secured by the Social Security Act, a law of the United States. Historically, 28 U.S.C. §1343 was the jurisdictional counterpart to §1983. Carter v. Greenhow, 114 U.S. 317, 320; Pleasants v. Greenhow, 114 U.S. 323 (1884). There is no evidence that Congress intended to change this linkage. Hence, a restrictive interpretation of §1343(3) combined with a restrictive view of \$1343(4), would create an anomalous category of cases where there is a substantial federal cause of action under \$1983 but no original federal court jurisdiction. The categorical assistance titles of the Social Security Act would constitute, to the best of our knowledge, the only federal regulatory or administrative program in which a federal cause of action cannot be litigated exclusively in a federal forum, much less not at all. Surely the conclusory reasons asserted below do not suffice to resolve this question involving, in the instant case, critical aspects of the welfare of 850,000 families and children and the lawful administration of considerable amounts of federal monies.

Motion to Advance

The reasons for expedition are implicit in the foregoing arguments for certiorari and the character of the harms resulting from this challenged violation of federal law. We refer the Court to the accompanying application for interim relief and the previous Petition for Certiorari and Motion to Expedite submitted before the summer recess for a fuller statement of the reasons supporting expedition. We add only that Petitioners are prepared to file a brief on several days notice and that both parties below had no difficulty adhering to a one-week briefing schedule in the Court of Appeals.

CONCLUSION

The Petition for a Writ of Certiorari and the Motion to Advance should be granted.

Respectfully submitted,

LEE A. ALBERT

Center on Social Welfare

Policy & Law

401 West 117th Street

New York, New York 10027

Telephone No.: (212) 280-4112

HENRY A. FREEDMAN SYLVIA ANN LAW ROBERT P. BORSODY Of Counsel CABL RACHLIN
JAMES SPITZER
DAVID DRASCHLER

General Counsel, National Welfare Rights Organization c/o Scholarship, Education and Defense Fund, Inc. 164 Madison Avenue New York, New York 10016

MARTIN GARBUS

Roger Baldwin Foundation of the American Civil Liberties Union 156 Fifth Avenue New York, New York 10012

BURT NEUBORNE

New York Civil Liberties Union 156 Fifth Avenue New York, New York 10010

DAVID GILMAN

General Counsel, City-Wide Coordinating Committee of Welfare Groups c/o MFY Legal Services Inc. 759 10th Avenue New York, New York

CESAR PERALES

Williamsburg Legal Services 260 Broadway Brooklyn, New York 11211 (for Petitioner Rosado) VIBGINIA SCHULER

Brownsville Legal Services
424 Stone Avenue
Brooklyn, New York
(for Petitioners Folk and
King)

EDWARD V. SPARER

The Yale Law School

New Haven, Connecticut 10520

HAROLD J. ROTHWAX
DAVID A. DIAMOND
MARIANNE J. ROSENFIELD
MFY Legal Services, Inc.
320 East Third Street
New York, New York

MORT COHEN
South Brooklyn Legal Services

152 Court Street

Brooklyn, New York 11201 (for Petitioner Hernandez)

Morton Friedman 112-10 Farmers Boulevard St. Albans, New York

ENDER TO APPENDIA

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INDEX TO APPENDIX

(Appendices A through F, containing the earlier opinions and orders in this case, were previously submitted to this court in Rosado et al. v. Wyman et al., Oct. Term, 1968, No. 1539. These appendices are hereby incorporated.)

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APPENDIX G

Opinion and Order of Hon. Jack B. Weinstein Granting Plaintiffs' Motion for Summary Judgment

In this Court's opinion granting plaintiffs' motion for a preliminary injunction, we held that section 402(a)(23) accomplishes two results. First, it creates a floor under present levels of benefits in the Aid to Families With Dependent Children Program (AFDC) by prohibiting cuts in welfare payments. Second, it requires that all states provide at least one increase both in the standard of need and the level of payment by July 1, 1969 to at least partially compensate for the rise in the cost-of-living.

There is "no genuine issue as to any material fact" on the question whether section 131-a of New York's Social Services Law meets this dual requirement. The statistical data supplied by both defendants and plaintiffs, while differing in some particulars, is consistent so far as it is legally relevant.

The change to the flat grant system—long favored by some as a more enlightened method of public assistance—has been used as a subterfuge to enact drastic cuts in both the standard of need and level of payment to meet the exigencies of a state budget in violation of the Congressional mandate embodied in section 402(a)(23). Accordingly, plaintiffs' motion for summary judgment must be granted.

Set out below are the Court's findings of fact and conclusions of law:

1. The schedules contained in section 131-a effect a substantial reduction in the standard of need and level of payment.

The estimates submitted by the state are that 111,899 welfare families will receive increases under section 131-a; that the total monthly amount of these increases is \$1,716,910; and that the average monthly amount of the increase per family is \$15.34. The decreases under section 131-a are greater in all respects: 141,313 families will receive decreases; the total monthly amount of these decreases is \$3,420,441; and the average monthly decrease is \$24.20. These figures are set out in the table below:

	A Party I		Monthly
	Number of Families	Total Monthly Amount	Average Change
Increases	111,899	\$1,716,910	\$15.34
Decreases	141,313	\$3,420,441	\$24.20

These statistics reflect only the changes in the regular recurring grant plus, for New York City only, the amount of the cyclical grant. They do not include the loss to dependent children of all the special grants—available under present law because they have heretofore been deemed by the state essential to children's welfare; these special grants are abolished under section 131-a to achieve a further reduction in state expenditures of many millions of dollars.

Approximately 80% of the AFDC recipients in the state reside in New York City. The figures for New York City are set out below:

	Number of Families	Total Monthly Amount	Monthly Average Change
Increases	79,838	\$1,091,471	\$13.67
Decreases	110,908	\$2,772,313	\$25.00

Plaintiffs have submitted statistics which attempt to compute the effect of eliminating non-recurring special grants for New York City residents. With this new variable included, the number of families receiving increases in New York City under section 131-a drops to a mere 245 and the total monthly amount of these increases is \$530 for all of New York City. Only a very rare class of New York City families—those with six or seven children, the oldest of whom was five years of age—would receive any increase at all. Conversely, the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amount of their decreases totals approximately \$5,950,000 per month.

Set out below is a table comparing the total average grant (recurring and special) per family in New York City under present law and under the section 131-a schedule:

Family Size	Present Law	Section 131-a
2	\$137.42	\$116
3	\$197.13	\$162
4	\$250.84	\$208
5	\$315.55	\$254
6	\$352.26	\$297
7	\$418.97	\$340
8	\$463.68	\$383
9	\$505.39	\$426
10	\$571.10	\$469

- 2. The elimination of special grants constitutes a reduction of the standard of need and level of payment.
- 3. The elimination of the cyclical grant for New York City residents constitutes a reduction of the standard of need and level of payment.

- 4. The elimination of differentiated larger grants for the needs of families with older children and the failure to provide for families with children above the mean age of the oldest child in families of a given size constitutes a reduction of the standard of need and level of payment.
- 5. The transfer of seven counties which are presently included in the SA-1 schedule to a lower schedule constitutes a reduction of the standard of need and level of payment for AFDC recipients of these counties. The small upward adjustment of the schedules of payments in some counties outside New York City promulgated administratively pursuant to the amendment to section 131-a discussed in the per curiam opinion of the three-judge court, Rosado v. Wyman, —— F. Supp. —— (E. D. N. Y. 1969), does not offset the reductions; the new schedules constitute a reduction in the current standard of need and level of payment.
- 6. Some persons who presently receive supplementary AFDC benefits will no longer be eligible for assistance under section 131-a.
- 7. New public assistance programs instituted by New York State will not offset the reductions effected by section 131-a.
- (a) Food Stamp Program. The Food Stamp Act provides that participating states shall not decrease welfare payments as a result of participation in this program. 7 U. S. C. § 2019(d). The state concedes that "Neither the donated commodities or food stamps may be deemed or construed to be public assistance in whole or in part or a substitute therefor. Participation in either program by recipients or others is completely voluntary."

In any event, federal funding is not yet certain and in many instances all that will be involved is a change from the Commodity Distribution Program. No projected food stamp program can offset the reductions in benefits described above.

- (b) Day Care Center Program. This program involves only a handful of recipients. It cannot serve as a substitute for AFDC payments, and it will be some time before the program is significantly expanded. No projected day care center program can offset the reductions in benefits described above.
- (c) Other Programs. Such programs as the Work Incentive Program are of minor significance and have little effect on the issues before us. Neither this program nor any other projected program nor any combination of such programs can offset the reduction in benefits described above.
- 8. The Governor's 1969-70 Proposed Budget contained an AFDC appropriation request of \$321,125,000 as a part of a total Local Assistance Fund request of \$1,040,014,000. In the March 29, 1969 budget bill, the legislature appropriated only \$912,014,000 to the Local Assistance Fund—a reduction of \$128,000,000. Of this sum, \$290,459,000 was earmarked for AFDC—a reduction of approximately \$30,000,000 or 10%. When the \$5,000,000 amount in the Governor's Proposed Budget for 1969 cost-of-living increases is eliminated, the reduction for AFDC is approximately \$25,000,000. Since the state's share is approximately 30%, the decrease in total AFDC payments under the New York State program is no less than \$75,000,000.

Defendants contend that the \$25,000,000 reduction in the state's share of AFDC costs "is the result of the allowance

schedules in Section 131-a including the elimination of special grants, the revision of Section 139-a, addition of Section 132-a and any other changes made by Chapter 184, Laws of 1969." However, no substantial portion of the savings could have been expected to result from changes in the welfare law other than section 131-a. The \$25,000,000 reduction represents almost entirely savings in AFDC grants.

9. The additional \$42,000,000 reduction in the AFDC appropriation contained in the May 2, 1969 Supplemental Budget was enacted in contemplation of increased federal funds and will not affect AFDC payments.

Plaintiffs' motion for summary judgment is granted.

So ordered.

Dated: Brooklyn, New York June 18, 1969

/s/ JACK B. WEINSTEIN U.S.D.J.

APPENDIX H

Opinion and Order of the United States Court of Appeals for the Second Circuit Vacating Preliminary and Permanent Injunctions, Reversing Summary Judgment and Affirming Dissolution of Three Judge Court

- (1) Appeals from an order and a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, F. Supp. (1969) and F. Supp. (1969), granting a preliminary injunction and a permanent injunction against enforcement of Section 131-a of the New York Social Services Law, Law of March 30, 1969, ch. 184, §5 [1969 McKinney's Session Laws of New York 215, 217], and granting summary judgment for plaintiffs-appellees. (2) Appeal from an order of a three-judge court of the Eastern District of New York, dissolving itself on the ground that the issue for which it was established was moot and that it had before it no new issue then ripe for adjudication.
- (1) The injunctions are vacated; the decision granting summary judgment is reversed. (2) The order of the three-judge court is affirmed.

HAYS, Circuit Judge:

Defendants-appellants, the New York Commissioner of Social Services and the New York Department of Social Services appeal from an order and a judgment of the United States District Court for the Eastern District of New York granting a preliminary injunction, —— F. Supp.—— (1969), and a permanent injunction, —— F. Supp.—— (1969), against enforcement of Section 131-a of the New York Social Services Law.

Subsections 1-3 of Section 131-a provide:

aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

¹ Law of March 30, 1969, ch. 184, \$5 [1969 McKinney's Session Laws of New York 215, 217].

¹³¹⁻a. Maximum monthly grants and allowances of public assistance

 Any inconsistent provision of this chapter or other law notwith standing, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and

^{2.} The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

(continued on following page)

An appeal by plaintiffs-appellees from a related decision of a three-judge court has been consolidated with the appeals referred to in the preceding paragraph.

T.

Plaintiffs-appellees in this class action are welfare recipients residing in New York City and in Nassau County. They receive payments pursuant to the Aid to Families with Dependent Children program (AFDC) of the Social Security Act, 42 U.S.C. §601-10 (1964, Supp. IV 1965-68). Under this program, in which all states participate, the federal government provides funds to the states on the condition that the plans for use of the funds meet various federal requirements. 42 U.S.C. §602(a) and (b) (1964, Supp. IV 1965-68). The states and their subdivisions also provide funds and each state administers its own program.

Appellees raised two principal claims in their complaint. The first was that Section 131-a violated Section 602(a)(23) of the Social Security Act² as amended in 1967 by reducing the amount of the AFDC benefits paid to them. The sec-

Number of Persons in Household

One Two Three Four Five Six Seven \$70 \$116 \$162 \$208 \$254 \$297 \$340

For each additional eligible needy person in the household there shall be an additional allowance of forty-three dollars monthly.

The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts;

Number of Persons in Household

One Two Three Four Five Six Seven 260 \$101 \$142 \$183 \$224 \$257 \$290

For each additional eligible needy person in the household there shall be an additional allowance of thirty-three dollars monthly.

Social Security Amendments of 1967, Pub. L. No. 90-248, \$213(b), 81 Stat. 821, 898 (codified in 42 U.S.C. \$602(a)(23) (Supp. IV 1965-68)).

ond claim, made by those appellees who are residents of Nassau County, was that Section 131-a violated the equal protection clause of the Fourteenth Amendment by providing for lower payments to AFDC recipients in Nassau County than to those in New York City, although the cost of living is substantially the same in both areas.

A three-judge district court was constituted under 28 U.S.C. §2281 (1964) to hear the constitutional claim.

While the action was pending before the three-judge court, Section 131-a was amended to permit the Commissioner of Social Services to increase scheduled payments for areas outside New York City up to a maximum no higher than the levels for New York City, upon his determination that the total cost of the items included in the schedule for such an area exceeds the amount provided in the schedule.* The three-judge court ruled that this amendment mooted the equal protection claim of the Nassau County recipients, by making it possible for their payments to be increased to the level provided for New York City recipients if the cost of living in Nassau County made such an increase appropriate. It concluded that "any attack on the newly adopted subdivision would not be ripe for adjudication by this Court until there has been an opportunity for action by state officials and until the matter comes before this Court in an appropriate proceeding." The three-judge court also held that the mooting of the constitutional claim made "academic" the question of whether it might have decided the statutory claim in the exercise of its pendent jurisdiction. It then ordered itself dissolved and remanded the case to Judge Weinstein "for such further proceedings as are appropriate."

³ Law of May 9, 1969, ch. 411, \$1 [1969 McKinney's Session Laws of New York 652-53].

Supp. — (1969). The same day Judge Weinstein issued an order temporarily restraining action under Section 131-a. Four days later he issued a preliminary injunction and denied appellants' motion to stay the injunction. On May 21 this court granted appellants' motion for a preference for their appeal from the order granting the preliminary injunction and denied appellants' motion for a stay without prejudice to renewal at the argument of the appeal. The appeal was argued on June 4, at which time the motion was renewed, and on June 11 this court stayed the injunction pending the disposition of the appeal. On June 16 this court denied appellees' motion to vacate the stay and denied appellants' motion to stay proceedings in the district court until the decision on the appeal from the preliminary injunction. The next day appellees appealed to the United States Supreme Court from the order of dissolution of the three-judge court. The appeal was accompanied by a petition for certiorari before judgment to this court and a motion to expedite Supreme Court consideration of the case. On June 18, while the appeal was still pending in the Supreme Court, the district court granted summary judgment for appellees and issued a permanent injunction. The same day appellants filed a notice of appeal to this court from the issuance of the permanent injunction. On June 19 this court granted appellants' motion to stay the permanent injunction and it also granted appellants' motion to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction. On June 24 the Supreme Court dismissed for want of jurisdiction the appeal from the dissolution of the three-judge court on the ground that the order was properly appealable to this court. The Supreme Court also refused to grant certiorari before judgment and denied appellees' motions to expedite review and to vacate the stays ordered by this court. 37 U.S.L.W. 3492. Appellees thereupon appealed to this court from the order dissolving the three-judge court and that appeal was consolidated with the appeals from the injunctions.

П.

We turn first to the issue raised by the appeal from the order of the three-judge court.

Appellees urge that the three-judge court erred in dissolving itself and that we should order it to resume its deliberations.

The court ordered itself dissolved because of the adoption of an amendment to Section 131-a permitting increased payments to AFDC recipients in Nassau County upon a determination by the Commissioner of Social Services that the increases are required in order to reflect actual cost of living. The three-judge court was of the opinion that the issue raised by the Nassau County plaintiffs was mooted by the amendment to Section 131-a and that the issue presented by the amendment itself was not yet ripe for adjudication.

We are persuaded that the court acted correctly. We are confirmed in this view by the fact that, since the dissolution of the three-judge court, the schedule of payments for Nassau County has in fact been increased by reason of the provisions of the amendment to Section 131-a. If corroboration of the opinion of the three-judge court be needed it is provided by this development. Obviously a determination by the court based upon the situation as it existed at the earlier date would have been premature and its decision would have been rendered moot by the provision of the new schedules for Nassau County. The court was right in refusing

to act on facts that were fluid and subject to early change. We affirm its order dissolving itself.

Ш.

Appellants contend that the single district judge erred in exercising jurisdiction to issue a preliminary and a permanent injunction on the basis of the statutory claim after the constitutional claim had become most and the three-judge court had dissolved itself.

Pendent Jurisdiction

The three-judge court specifically refused to decide whether it could have exercised pendent jurisdiction to rule on the statutory claim after it had determined that the constitutional claim was moot. — F. Supp. at — (1969). In remanding the case to the single district judge for "appropriate" action the court did not decide whether he could exercise such jurisdiction.

The assertion of a constitutional claim required the convening of a three-judge district court. 28 U.S.C. §2281 (1964). That court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any

claim over which the single judge could exercise adjudicatory power.

King v. Smith, 392 U.S. 309 (1968) provides no authority for deciding the pendent statutory claim. There the Court said:

"We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n. 3.

While the Court in King decided a pendent statutory claim, the constitutional claim to which it was pendent remained viable throughout the litigation. The Court exercised jurisdiction over the pendent statutory claim in order to avoid adjudication of the constitutional issue.

Moreover even if we were to accept the overbroad interpretation of the doctrine of pendent jurisdiction urged upon us by appellees, we would hold in the present case that the district judge's exercise of such jurisdiction was an abuse of discretion.

In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), it is clear that there are circumstances in which the exercise of pendent jurisdiction is inappropriate. We believe that it is inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.

A federal court should not assert such power over a state legislature unless there is no possible alternative. Even if the district judge had had discretion, he should have refused to rule on the statutory claim.

In King v. Smith, supta, the relief granted, enjoining the application of the Alabama "man in the house" regulation, did not have the effect of requiring the state legislature to appropriate additional funds. By invalidating the state regulation, the court substantially increased the number of eligible aid recipients but it specifically noted that Alabama was "free . . . to determine the level of benefits by the amount of funds it devotes to the program." Id. at 318-19 (footnote omitted). See Lampton v. Bonin, — F. Supp. — (E.D. La. 1969) (three-judge court).

The Department of Health, Education and Welfare is now engaged in a study of the relationship between Section 602 (a) (23) and Section 131-a. HEW, with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of cependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to lo so, at least until HEW had completed its consideration of the matter.

Lection 1331

The district judge also found that he had jurisdiction to decide the statutory laim under 28 U.S.C. §1331 (1964) which provides for jurisdiction over federal questions where "the matter in controversy exceeds the sum or value of \$10,000 "

The district judge Ploperly held that the claims of the members of the class may not be aggregated to satisfy the \$10,000 requirement. See Snyder v. Harris, 37 U.S.L.W. 4262 (U.S. March 25, 1969). He also correctly ruled that "the monetary loss to each of the plaintiffs

does not approach \$10,000." — F. Supp. at —. But after finding that appellees could not obtain jurisdiction by showing direct damage of \$10,000, the district judge decided that the "indirect damage" they might sustain as a result of their reduced payments was sufficient to satisfy the \$10,000 requirement. "Indirect damage" is too speculative to create jurisdiction under Section 1331.

"It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in Barry v. Mercein, 46 U.S. (5 How.) 103, 12 L. Ed. 70 (1847), a child custody case. The 'right to the custody, care, and society' of a child, the court noted, 'is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations.' 46 U.S. at 120. Since the statute permitted appeals only in those cases where the 'matter in dispute exceeds the sum or value of two thousand dollars,' the court concluded that it was without jurisdiction:

'The words of the act of Congress are plain and unambiguous * * *. There are no words in the law, which by any just interpretation can be held to * * * authorize us to take cognizance of cases to which no test of money value can be applied.' 46 U.S. at 120.

Subsequent decisions have followed this reasoning. See Kurtz v. Moffitt, 115 U.S. 487, 498, 6 S. Ct. 148, 29 L. Ed. 458 (1885); First Nat. Bank of Youngstown v. Hughes, 106 U.S. 523, 1 S. Ct. 489, 27 L. Ed. 268 (1882); Giancana v. Johnson, 335 F. 2d 366 (7th Cir.

1964), cert. denied, 379 U.S. 1001, 85 S. Ct. 718, 13 L. Ed. 702 (1965); Carroll v. Somervell, 116 F. 2d 918 (2d Cir. 1941); United States ex rel. Curtiss v. Haviland, 297 F. 431 (2d Cir. 1924); 1 Moore, Federal Practice [0.92[5]] (2d ed. 1964)."

Boyd v. Clark, 287 F. Supp. 561, 564 (three-judge court, S.D.N.Y. 1968), aff'd on another issue, 393 U.S. 316 (1969) (footnotes omitted).

Section 1343

Appellees argue on two grounds that jurisdiction over the statutory claim exists under 28 U.S.C. §§1343(3) and (4) (1964). Having found that jurisdiction existed under the doctrine of pendent jurisdiction and under Section 1331, the district judge did not rule on this issue.

Sections 1343(3) and (4) provide:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first contention of appellees is that their claim under the AFDC provisions creates a cause of action under 42 U.S.C. §1983 (1964), for which jurisdiction is conferred by Sections 1343(3) and (4). Section 1983 states:

"Every person who, under color of any statute, or dinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint, properly read, does not allege the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. The burden of the complaint is that New York's statute, Section 131-a, is not in conformity with the requirements of Section 602(a)(23) of the federal statutes and that therefore New York is not entitled to receive federal grants under the AFDC program. Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See New York v. Galamison, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965); Bradford Audio Corp. v. Pious, 392 F. 2d 67 (2d Cir. 1968).

Moreover, it is clear that the defendant Department of Social Services for the State of New York is not a "person" within the meaning of Section 1983. See Monroe v. Pape, 365 U.S. 167, 187-92 (1961); Clark v. Washington, 366 F. 2d 678, 681 (9th Cir. 1966); Williford v. California, 352 F. 2d 474 (9th Cir. 1965). Since the suit here con-

stitutes an attack on a state statute, and not on action taken under it, the plaintiffs' complaint is against the state and not against the Commissioner as an individual. He too is therefore not within the scope of Section 1983.

Appellees' second contention is that the Social Security Act, which contains the AFDC provisions, is a law providing for "equal rights" so that jurisdiction exists under Section 1343(3) independently of the existence of any claim under the Civil Rights Act. Section 602(a)(23) is not designed to secure "equal rights" for purposes of Section 1343(3).

IV.

Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds.

Under the AFDC provisions in effect prior to the enactment of Section 602(a) (23), the states, in order to receive grants under the federal program, were required to set a standard of need under which recipients qualified for payments but they were not required to pay the full standard and in practice many of them did not. See King v. Smith, supra, 392 U.S. at 318-19, 334. As originally proposed, Section 602(a) (23) would have required each state to pay its full standard of need and to adjust that standard annually in accordance with changes in the cost of living. H.R. 5710, §202, 90th Cong., 1st Sess. (1967). In the statute as finally adopted both the provision requiring the states to pay their full standard of need and the provision requiring an annual cost of living adjustment in that standard were eliminated.

⁴ See note 2, supra.

Section 602(a)(23) now provides:

"§602(a) A State plan for aid and services to needy families with children must . . .

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The appellees contend that the mandated cost of living adjustment requires that all states which, prior to the amendment, were paying benefits equal to their full standard of need must continue to pay their full standard adjusted to reflect the cost of living as of July 1, 1969. In effect, they argue that $\S602(a)(23)$ sets a floor under state AFDC benefits, freezing them at their previous level plus the cost of living adjustment.

We believe that Section 602(a)(23) was not intended to have anything like this broad a scope. We read it as making two far less dramatic changes in the law. First, it requires each state to make an adjustment in its standard of need by July 1, 1969, to reflect changes in the cost of living, but does not require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them. The second change required by the statute was not intended to affect New York at all. It refers to a practice employed in many states, not including New York, of imposing a maximum on the amount of aid a family may receive, regardless of its

size. The statute requires that family maximums of the type imposed by these states are to be adjusted by July 1, 1969, to reflect changes in the cost of living.

Our construction of Section 602(a)(23) finds support in the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the states. The Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the level of benefits. See King v. Smith, supra, 392 U.S. at 318-19, 334.

The Conference Report on Section 213 of the bill, which contained the version of Section 602(a)(23) that was enacted, indicates the correctness of a narrow interpretation. In discussing the portion of the pre-Conference version of Section 213 that dealt with certain non-AFDC recipients, the Report states that the Section would have required "each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable," and thus mandated an increase in aid. However, in explaining the portion of Section 213 that, except for a change from an annual cost of living adjustment to a single such adjustment, became Section 602(a)(23), the Report states only that the bill would require each state to "adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967),

⁵ Maine, for example, provides \$27 per month for each child after the first but permits a family to receive a monthly grant of no more than \$250. See Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969), where a three-judge district court ruled that the Maine regulation imposing a family maximum violated the equal protection clause of the Fourteenth Amendment. See also Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968, 1969) (three-judge court).

reprinted in [1967] U.S. Code Cong. and Admin. News 3179, 3208-09. The absence of any statement that the portion of Section 213 relating to AFDC payments was intended to effect an adjustment in "the extent of [each state's] aid or assistance" is significant in view of the fact that the immediately preceding discussion of the portion of Section 213 relating to other kinds of assistance refers specifically to such an adjustment in "the extent of . . . aid."

The absence in the legislative history of any support for appellees' interpretation of the statute as imposing a floor on payments is especially significant in view of the long-standing Congressional practice of not imposing such restrictions on the states. As HEW said of Section 602(a)(23) in the brief it submitted in Lampton v. Bonin, supra, "The Congress could hardly have paid less attention to it." It is inconceivable that if this were the far reaching measure serving to reverse a basic national policy which plaintiffs claim it was, it should be adopted without comment from committees and individual members of Congress.

That Section 602(a)(23) was not intended to have the broad effect urged by appellees is further indicated by the fact that it is not even discussed in the "Summary of Social Security Amendments of 1967," a joint publication of the Senate Committee on Finance and the House Committee on Ways and Means, which was prepared for the use of the two committees by the committee staffs. Similarly the "Summary of Principal Provisions" of the Senate bill contained in the Senate Finance Committee report

⁶ HEW's brief expresses agreement with our view on the fundamental proposition that Section 602(a)(23) did not mandate increases nor freeze floors, but left the states free to reduce AFDC payments. However the HEW analysis differs from ours in some respects.

makes no mention of the provisions that became Section 602(a)(23). S. Rep. No. 744, 90th Cong., 1st Sess. (1967), reprinted in [1967] U. S. Code Cong. and Admin. News 2834, 2840.

V.

We find that the only obligation imposed on New York by Section 602(a)(23) is that sometime between January 2, 1968, the effective date of Section 602(a)(23), and July 1, 1969, the deadline imposed by the Section, it must adjust its standards of need to reflect the cost of living. The schedules in Section 131-a are based on prices as of May, 1968. Thus New York has complied with Section 602(a)(23).

The two injunctions are vacated and the decision granting summary judgment for appellees is reversed. The order of the three-judge court dissolving itself is affirmed.

LUMBARD, Chief Judge (concurring):

I concur in the result.

While I agree with much of Judge Hays' opinion our differences on some issues necessitate this separate statement.

I rest my concurrence on the ground that the district court abused its discretion in rendering judgment on the pendent claim.

The district court, in my view, did have pendent jurisdiction over the statutory claim in the sense of judicial power. The Supreme Court has held that power exists "in the federal courts" to decide a pendent claim when, (1) it is joined to a constitutional claim which is not insubstantial, and, (2) the nature of the pendent and constitutional claims are such that the plaintiff "would

ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 72 (1966). Both of these tests are satisfied in this case.

The fact that the three-judge court declared the constitutional claim moot and thereupon dissolved itself, referring the proceedings back to the single judge district court, did not deprive the district court of pendent jurisdiction. Pendent jurisdiction, in the sense of judicial power, attaches at the outset of a suit. See *United Mine Workers* v. Gibbs, 383 U.S. 715, 727 (1966). The subsequent dismissal of the constitutional claim, Gibbs makes clear, does not deprive the federal courts of all power over a properly joined pendent claim. What it does do is to mandate a reassessment by the three-judge court, or by the single district judge upon referral by the court, of the propriety of proceeding further on the pendent claim. The question becomes one of discretion, and not of judicial power in the strict sense. See id. at 726-27.

I know of no authority which prohibits a three-judge court, after it has disposed of a constitutional claim, from referring any remaining pendent claims to a single judge for appropriate disposition. A flat prohibition on such references does not recommend itself from the standpoint of judicial convenience and economy, for often a single judge will be able to dispose of the pendent claims more expeditiously than the cumbersome three-judge court machinery. Of course, the three-judge court might well have dismissed the pendent claim, but, for reasons which are not stated, it did not do so.

In any event, the propriety of the single judge's decision concerning whether or not to proceed to judgment on a pendent claim is subject to review for abuse of discretion, and that is the issue I find squarely presented in this case.

There is force to Judge Hays' suggestion that one factor relevant to the exercise of the district court's discretion is the nature of the remedy sought by plaintiffs. Here the remedy was extreme: an injunction against the operation of a welfare program under a state statute. Congress established the three-judge court mechanism to insure that a state statute would not be enjoined on constitutional grounds simply on the decision of a single judge. While a three-judge court is not required when an injunction is sought on statutory grounds, as here, nonetheless the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge. This is particularly true in a case such as this, where the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge. Cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), holding that pendent state claims should be dismissed if the constitutional claim is dismissed before trial.

It is true that the pendent claim in this case is founded upon federal law, thus making the exercise of jurisdiction by a federal court less objectionable than if the claim arose under state law. But here, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of which this claim turns—the practical effect of \$131-a and the proper construction of \$602(a)(23) of the Social Security Act—both are exceedingly complex. The briefs and arguments of the parties, and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW, with its expertise in the operation of the AFDC program

and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not §131-a is in compliance with §602(a) (23). This is HEW's responsibility under the Social Security Act, see 42 U.S.C.A. §1316 (Supp. 1969). I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning §131-a. The Department's determination, it should be noted, will be reviewable in the courts at the instance of either the state, under 42 U.S.C. §1316(a)(3) (Supp. 1969), or the plaintiffs under the Administrative Procedure Act.

While I agree with Judge Hays' treatment of the jurisdictional issue raised under 28 U.S.C. §1331, we differ somewhat with respect to the application of 28 U.S.C. \$1343(3) and (4). I do not find that the plaintiffs' claim under \$602(a)(23) involves the redress of either "equal rights" or a "civil right" as those terms are used in §1343. I do not believe that the claim, although one founded on a federal right, falls within the ambit of 28 U.S.C. §1983, for it lacks the constitutional overtones that have been present in all the welfare cases cited by the plaintiffs which have been sustained under that section. But even if a broad reading of §1983 is accepted it cannot change the nature of the plaintiffs' claim for the purposes of §1343. On its face it is clear that §602(a)(23) has nothing to do with "equal rights," and it also cannot be said to involve a "civil right" in view of the circumstances which gave

In King v. Smith, 392 U.S. 309 (1968), a case much relied on by plaintiffs, HEW had already given notice to the state that its regulation did not conform to the requirements of federal law. 392 U.S. 326 n. 23. Thus the challenge to the regulation made in the King suit was ripe for resolution by the courts.

rise to the enactment of §1343(4) in 1957. See U.S. Code Cong. & Adm. News, 85th Cong. (1957), pp. 1966, 1976,

H.R. Rep. No. 291.

Since I do not feel that the federal courts are the appropriate forum for the initial resolution of plaintiffs' statutory claim, I do not reach the merits of that claim. At the same time, I should add that Judge Feinberg's view of the merits does not persuade me.

Feinberg, Circuit Judge (dissenting):

The decision in this case allows the State of New York to receive millions of federally granted dollars and then proceed to ignore the federal law granting them by reducing payments to thousands of welfare recipients already living at a bare subsistence level. This result follows from a restrictive interpretation of the district court's jurisdiction and allowable discretion and of the meaning of the applicable federal statute. I respectfully but emphatically dissent.

Because of the differences in the opinions of my brothers, it is necessary to describe them precisely. As I understand it, they agree that the three-judge court properly dissolved itself. Judge Hays rules that the single judge thereafter had no jurisdiction; Chief Judge Lumbard is of the view that the single judge had the power to decide the case, but agrees with Judge Hays that it was an abuse of discretion to do so. Finally, Judge Hays decides that section 131-a of the New York Social Services Law does not conflict with the 1967 amendment of the Social Security Act referred to as section 602(a)(23). Chief Judge Lumbard does not deal with the merits, although he finds unpersuasive the interpretation of section 602(a)(23) contained in this dissenting opinion. I dissent from the

holdings that the single judge lacked jurisdiction or abused it, and that section 131-a does not conflict with section 602 (a) (23). Discussion of the propriety of dissolution of the three-judge court is deferred to point III below. I turn first to the question of the jurisdiction of Judge Weinstein to grant plaintiffs relief.

I. Jurisdiction of the single judge.

On this aspect of the case, the issue is whether the United States District Court for the Eastern District of New York had jurisdiction to determine whether federal funds were about to be spent in a manner that would violate a federal statute. Thus stated, the question begs for resolution in a federal court, rather than in a state forum as appellants contend. Moreover, the formidable intricacies of three-judge court procedure should not be allowed to obscure this basic issue.

The district court judge originally convened a threejudge court on April 24, 1969, plaintiffs' complaint having challenged section 131-a of the New York Social Services Law on two main grounds: first, denial of equal protection of the laws because residents of Nassau County would be discriminated against by new payment schedules below those for residents of New York City, and second, conflict with a federal statute, 42 U.S.C. §602(a)(23). Thereafter, the three-judge court held a hearing. While the issues were before it, the New York State legislature adopted an amendment to section 131-a, which the threejudge court felt rendered the equal protection claim moot. Accordingly, that court dissolved itself on May 12, 1969, and remanded the matter back to the single judge. On May 15, Judge Weinstein issued his opinion and on May 16, his order from which appeal has been taken.

Judge Weinstein's conclusion that he had jurisdiction was based upon two theories: that jurisdiction to decide the federal statutory claim was pendent to the federal constitutional claim and that jurisdiction also existed under 28 U.S.C. §1331. He noted that there might also be independent jurisdiction over the federal statutory claim under 28 U.S.C. §1343(3), but found it unnecessary to decide that question. I agree with the district court judge that pendent jurisdiction existed even though the federal constitutional claim of denial of equal protection had been eliminated from the case. I reach this conclusion by either of two routes.

A. Assume that the jurisdiction exercised over the statutory claim was that of the three-judge court. In King v. Smith, 392 U.S. 309 (1968), the Supreme Court made clear that when a federal constitutional claim and a federal statutory claim are joined together, the three-judge court has power to decide the latter. In fact, that is what the Supreme Court did, putting aside the constitutional issue. It is true that in footnote 3, the Court said (392 U.S. at 312):

We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts. See generally Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

However, that referred to a suit brought only on the statutory ground, a situation not present in that case or here. Indeed, in Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80-81 (1960), the Court said that a properly convened three-judge court has jurisdiction

"over all claims" raised against a state statute. The footnotes in that opinion at pp. 81-82 make clear that the
quoted phrase applies not just to claims based upon a
federal statute but even to "local questions" arising under
a state constitution and to "every question involved,
whether of state or federal law." Therefore, if the threejudge court in this case was properly convened, as it said
it was, it had the power to decide the statutory claim. It
chose not to do so on its theory that the constitutional
claim had become moot, stating:

We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. King v. Smith, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court.

Thus, it is not clear whether the court thought it could or could not exercise pendent jurisdiction, or whether it was deciding that no judge should exercise that jurisdiction or was leaving the question for the single judge. In any event, the matter was remanded back to the single judge "for such further proceedings as are appropriate." Therefore, Judge Weinstein was left with the possibility that the pendent jurisdiction he said that he exercised was that of the three-judge court passed back to him. Cf. Landry v. Daley, 288 F. Supp. 194 (N.D. Ill. 1968). If he was exercising that jurisdiction, then under the cases cited above his power to do so was clear, unless the moot-

ness of the constitutional claim prevented him, an issue discussed further below.

B. Assume, however, that because the three-judge court had been dissolved the case must be considered on the theory that the pendent jurisdiction allegedly exercised was only that of the single judge district court. Both the constitutional and statutory claims were in the complaint as originally filed. Judge Weinstein convened the threejudge court to consider both but pointed out that if it should subsequently be determined that a three-judge court was not required, "the single judge's decision, as part of that three-judge court, would become the opinion of the Court." When the complaint was filed, the federal constitutional claim of denial of equal protection of the laws was not frivolous and clearly fell within the jurisdictional language of 28 U.S.C. §1343(3), since it sought to redress the deprivation, under color of a state law, of a right secured by the Constitution. The substantive statutory basis for the action was 42 U.S.C. §1983. Insofar as the constitutional claim is concerned, the only reason for a three-judge court was that plaintiffs sought to enjoin the "enforcement, operation or execution" of a state statute. 28 U.S.C. §2281. That did not change the jurisdictional basis; it was a concomitant of the relief sought. At the time the complaint was filed, Judge Weinstein had sufficient "jurisdiction" over the constitutional claim to grant a temporary restraining order, 28 U.S.C. §2284(3), as indeed he did. It is unnecessary to speculate whether in appropriate circumstances the single judge could have, on the basis of the constitutional claim, granted damages against defendant Wyman in an individual capacity1 or

See, e.g., Monroe v. Pape, 365 U.S. 167 (1961); Kletschka v. Driver,
 F. 2d — (2d Cir., April 22, 1969).

issued a declaratory judgment to plaintiffs if they had limited themselves to the two prayers for declaratory relief in the complaint instead of adding another for injunctive relief as well.2 In fact, plaintiffs took the position before Judge Weinstein that a three-judge court was not required because, inter alia, declaratory relief was sought. While Judge Weinstein thought that the request for injunctive relief made a three-judge court necessary, it is not accurate to say that he had no jurisdiction over any aspect of the constitutional claim when the complaint was filed. If such jurisdiction did exist-and I believe that it did-a closely related statutory claim could also be decided by a single judge under the general principles of pendent jurisdiction, liberally construed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Therefore, Judge Weinstein had pendent jurisdiction over the federal statutory claim at the time the case first came before him. It may even be-although it is not necessary to resolve that

That the state statute could be held unconstitutional in a declaratory ruling by the single judge seems settled. See ALI Study of the Division of Jurisdiction Between State and Federal Courts 245 (Tent. Draft No. 6, 1968), recommending that such a declaratory judgment require a three-judge court but noting:

[[]T]he requirement is here extended to cases seeking only a declaratory judgment, a remedy which was unknown in 1910. Three judges are not now needed in such a case. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154-155 (1963); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960).

And see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13-20 (1964).

The basic and pendent claims "must derive from a common nucleus of operative fact," 383 U.S. at 725, clearly present in this case, e.g., the level of benefits before and after section 131-a and the relationship between benefits and need. The court has power to hear all of the claims if plaintiffs "would ordinarily be expected to try them all in one judicial proceeding," id., assuredly the case here.

issue—that the judge could have acted upon plaintiffs' suggestion that he decide the statutory issue first and convene the three-judge court later, if necessary. Cf. Kelly v. Illinois Bell Telephone Co., 325 F. 2d 148 (7th Cir. 1963); Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F. 2d 317 (6th Cir. 1958); but cf. Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960). The judge declined that invitation not because he thought he lacked the power to so rule but because he felt that convening the three-judge court would avoid "costly" delay.

The crucial question on either theory A or B is whether the elimination thereafter of the constitutional claim as most necessarily divested the district court of jurisdiction it already had. In *United Mine Workers* v. Gibbs, supra, the Court did say, 383 U.S. at 726:

Certainly, if the federal claims are dismissed before trial, even though not unsubstantial in a jurisdictional sense, the state claims should be dismissed as well.

But the Court spoke there in the context of a federal against a state claim. The point here is that the alternative claim to which pendent jurisdiction attached was not a state claim at all, but a claim based upon a federal statute. Moreover, the dismissal of the constitutional claim here did not occur "before trial" but after Judge Weinstein and the three-judge court had spent days in taking evidence and hearing argument on the motion for an injunction. Indeed, Judge Weinstein issued a preliminary injunction only three days after dissolution of the three-judge court and without any further hearing. Moreover, appellants concede that, in effect, at that point a

full trial had been held. Certainly there have been instances where pendent jurisdiction has been allowed to continue even though the basic federal jurisdictional claim has been denied, see, e.g., Hurn v. Oursler, 289 U.S. 238 (1933); United Mine Workers v. Meadow Creek Coal Co., 263 F. 2d 52, 59-60 (6th Cir.), cert. denied, 359 U.S. 1013 (1959); Travers v. Patton, supra, 261 F. Supp. at 116; cf. Murphy v. Kodz, 351 F. 2d 163 (9th Cir. 1965), or mooted. Hazel Bishop, Inc. v. Perfemme, Inc., 314 F. 2d 399 (2d Cir. 1963).

The reasons Judge Weinstein gave for retention of jurisdiction were as follows:

The pendent claim does not involve state law alone, but poses crucial and important questions of federal statutory law. It vitally affects a national program designated to protect the fundamental rights of children to the sustenance and stable family life which will enable them to develop into full members of our society capable of exercising their rights and responsibilities under the United States Constitution and it involves the expenditure of billions of dollars of federal monies. The courts in the federal system are in at least as good a position as state courts to adjudicate this question of federal law. Nor can this be described as a petty or unimportant controversy of the kind Congress sought to exclude from the federal courts.

⁴ See Appellants' Application for a Stay of Further Proceedings in the District Court, June 13, 1969, at 2:

The extraordinarily broad nature of the preliminary injunction in this case and the opinion of the Court below which supported it is such that every real issue in the case had been decided by the District Court and is presently before this Court.

A speedy determination of this litigation is highly desirable. From the point of view of the plaintiffs, an unnecessary reduction of their benefits may reduce their income below subsistence level, causing grievous harm. From the state's vantage point, an unnecessary extension of any temporary restraining order preventing institution of the new reduced benefits would, according to the testimony of a Deputy Commissioner in the State Department of Social Services, result in a loss to the state of up to ten million dollars a month. Dismissal, under the abstention doctrine, would require plaintiffs to commence a new suit in the state courts. Resulting loss of time would make it impossible to decide the issues before administrative arrangements must be made to implement the new state statute by its effective date-July 1, 1969.

Furthermore, the parties have already presented substantial testimony, affidavits and briefs to the Court. The expenditure of time by the litigants and the Court would be, to a large extent, wasted were all these materials to be offered anew in a state court.

These were compelling considerations. Whether pendent jurisdiction exists depends in part upon the same reasons which justify its exercise. On these facts, jurisdiction was justified by the saving of judicial time once the case had gone as far as it had, by concern for fairness to the litigants, and by the appropriateness of having a federal court decide the issue whether congressional conditions to receipt of federal funds are met. See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv. L. Rev. 657, 664-71 (1968). It should also be noted that a three-judge court in Texas, faced with a similar issue, has apparently just ruled for plaintiffs in that action on the basis of the same federal statute

involved here, while also denying various federal constitutional claims. *Jefferson* v. *Hackney*, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969) (opinion to follow judgment).

Various other arguments regarding the exercise of discretion by the district court remain to be answered. The contention is made that the pendency of an administrative proceeding by the Secretary of Health, Education and Welfare made the district court action "premature" or inappropriate. That "proceeding" was apparently pending in April, and we are not favored with any indication of HEW action other than its request to New York State for further information. The delays inherent in HEW review and the difficulty of obtaining effective exercise by HEW of any sanction were obvious in King v. Smith, 392 U.S. 309, 326 n. 23 (1968), in which the Court professed no qualms over deciding the issue of construction of the Social Security Act then before it, although HEW had not acted definitively. Cf. Damico v. California, 389 U.S. 416 (1967); Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 91-92 (1967). In view of the overpowering justification for Judge Weinstein's exercise of discretion to decide the statutory issue, I would not regard the speculative possibility of HEW action as a ground for reversal. If plaintiffs are correct on the merits, as I believe them to be, they will continue to suffer severe and possibly irreparable injury for an indeterminate length of time while HEW studies the problem and negotiates with the state. At the very least, therefore, even under the point of view of the majority, the court should exercise its jurisdiction to the extent of enjoining the operation of the New York statute pending completion of HEW proceedings.

Nor do I agree with the suggestion that the action of the district court was improper because it in effect ordered the state to appropriate additional funds. The district court's holding merely establishes that New York must meet the federal conditions requisite to participation in the federal program or cease its participation. Such a ruling is neither improper nor unprecedented. Thus, a number of courts have recently determined that state maximums on the amount of aid to AFDC families were invalid as violating the equal protection clause or the Social Security Act or both. In at least two of these cases the courts took pains to point out that they were not affirmatively ordering the respective states to appropriate additional funds but only holding that if the states had appropriated insufficient funds to meet the total need they could not "correct the imbalance" by applying the invalid maximums. Dews v. Henry, 297 F. Supp. 587, 592 (D. Ariz. 1969); Williams v. Dandridge, 297 F. Supp. 450, 459 (D. Md. 1968); cf. Westberry v. Fisher, 297 F. Supp. 1109, 1116 (D. Maine 1969). The majority opinion distinguishes King v. Smith, supra, because it "did not have the effect of requiring the state legislature to appropriate additional funds." It is true that the Court there emphasized the latitude of a state in setting "its own standard of need and . . . level of benefits," 392 U.S. at 318, but the effect of section 602(a)(23) was not involved in that case. Moreover, I do not believe that either King v. Smith or Shapiro v. Thompson, 37 U.S. L.W. 4333 (U.S. April 21, 1969), which deals with residency requirements, would have been decided differently even if it had been assumed—and the assumption seems logical that the rulings would increase the expense to a state. In the latter decision, the Court noted that "appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification." Id. at 4337 (footnote omitted). In any event, were it necessary, we could follow the example of the three-judge court judgment in Jefferson v. Hackney, discussed above, which stayed the injunction of the invalid Texas statute for 60 days in order to give the state an opportunity to implement a plan conforming to the requirements of the federal statute. While it may be likely that New York would in fact decide to appropriate additional funds rather than to take some other course of action, that probability is not equivalent to the judicial usurpation of state legislative functions.

Finally, the point is made that a single judge somehow abuses his discretion by enjoining a state statute on the ground that it conflicts with a federal statute. If all that is meant is that it would have been better for three judges rather than one to have ruled on the statutory claim in this case, I agree. The three-judge court had that claim before it and should have decided it rather than dissolving. See point III below. However, if the point is that the single judge in granting injunctive relief thereafter abused his discretion merely because he was a single judge, I disagree. Congress has made the decision not to require three judges when the claim for injunctive relief is based on a federal statute rather than on the Constitution. Swift & Co. v. Wickham, 382 U.S. 111 (1965). Whatever may be the merits of a contrary point of view-see Currie, The Three-Judge Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 55-64 (1964)—the change should now come from Congress.

Thus, I conclude that Judge Weinstein had pendent jurisdiction over the statutory claim whether that jurisdiction be of the three-judge court or a single judge court. Jurisdiction was not lost because the constitutional claim became moot. The judge did not abuse his discretion by deciding the statutory claim on the merits. On this theory, it is not necessary to decide whether, as appellees contend, there would be jurisdiction under 28 U.S.C. §1343(3) or (4) over a case brought on the statutory claim alone. See Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 111-15 (1967). Finally, it is equally unnecessary to decide whether Judge Weinstein was correct in holding that there was jurisdiction under 28 U.S.C. §1331.

Under the rulings of my brothers, the procedural labyrinth of the three-judge court has swallowed up a substantial claim that thousands of AFDC recipients in New York State will be greatly harmed by the violation of a federal statute. The United States District Court for the Eastern District of New York originally had jurisdiction over that claim. Thereafter, the three-judge court was properly convened, according to its own statement, and continued to have that jurisdiction. That court never denied that it could exercise such jurisdiction and did not reject it. Yet, the jurisdiction which both the single judge court and then the three-judge court had has now somehow magically disappeared or is inappropriate for exercise. I dissent from this grudging assessment of the jurisdiction and discretion of the district court.

II. Legality of section 131-a.

Since Judge Hays not only holds that the district court lacked jurisdiction to determine the substantive issues raised in the case before us, but also expresses his views on the merits, I will set forth my reasons for dissenting on that issue as well. This requires an analysis of the

interaction of the federal statute, section 602(a)(23), and the New York statute, section 131-a.

Basic to analysis of the fundamental clash between the two statutes is an understanding of how the program of Federal Aid to Families with Dependent Children (AFDC) operates. The AFDC program is over 30 years old and no state is required to participate in it. But all do and receive payments from the federal government in varying amounts on a matching fund basis. Thus, in New York, 50 per cent of all funds paid to "needy dependent children and the parents or relations with whom they are living," 42 U.S.C. §601, is provided by the federal government. Clearly, then, there is an overwhelming federal interest in the administration of the AFDC program in New York. since the state and the federal government pay for it equally. While administration of the AFDC program is left to the individual states, each state's plan for payments must be approved by the federal government and must meet the requirements of the Social Security Act, 42 U.S.C. §602.

To take advantage of federal AFDC payments, each state must set forth a standard of need and provide a level of benefits based upon this standard. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). The standard of need is determined by adding together the cost of those items deemed necessary for subsistence. As might be expected, both the standard of need and the benefits actually paid vary in content and amount. As to the former, judgments vary in the several states as to what items are necessary for subsistence and what they cost. As to the latter, some states pay 100 per cent of what is defined

⁵ Actually, the state's direct monetary interest is even smaller, as local governments provide a substantial portion of the non-federal funds.

as the standard of need, while others pay an amount which is less than the standard of need, either by fixing benefits at a percentage of that standard, or by imposing a flat maximum on the amount of benefits to a family. New York has paid 100 per cent of the standard of need, as it defines it, and still purports to follow that course.

It is against this background that we must assess the effect of congressional enactment in 1967 of section 602(a) (23), which requires of each state's AFDC plan that it:

provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

The critical flaw in appellants' arguments is that they unavoidably require accepting the proposition that in enacting section 602(a)(23) Congress was engaging in a virtually meaningless exercise of ineffectual verbiage. Simply stated, under the proffered interpretation of this legislation, if at some time between January 2, 1968, the date the section became law, and July 1, 1969, a state has complied with the statute's direction that

the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully

⁶ In determining the amount of aid to be paid to a particular individual or family the state may, of course, take into consideration other income or resources of the recipient. See 42 U.S.C. \$602(a)(7), (8).

changes in living costs . . . and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted

the state has at once fully satisfied the congressional requirement and is thereafter free promptly to nullify the adjustment and reduce its AFDC payments back to their original levels or, as in the case of New York State, to substantially lower levels. This hypothesis, inherent in appellants' position, makes a mockery of congressional purpose.

It may be useful to summarize just what the State of New York has done. In August 1968, the Department of Social Services, pursuant to its usual practice, adjusted its standard of need to reflect the rise in the cost of living as determined by a survey it had previously conducted. Even if this initial increase was sufficient "to reflect fully" cost of living changes, however, any attempt at compliance with section 602(a)(23) was vitiated by the passage thereafter of section 131-a of the New York Social Services Law. That section not only wipes out the modest increases of August 1968, but effects additional and very substantial reductions in welfare benefits to the great majority of AFDC recipients. First, the amounts of the regular, recurring payments to families of specific sizes for their fundamental needs are no longer related to the actual age of the oldest child in each family but are standardized sums based on a mean age of the oldest child in all recipient families of that size, an adjustment which results in sharp reductions in regular grants to many families with older children. In addition, "flat grants" to cover major expenditures for clothing and home furnishings are substantially abolished and almost all previously existing "special grants" to cover extraordinary individual needs such as medically-dictated special diets, maternity expenses, homemaker services, and the like are eliminated.

The district judge concluded that the actual impact of these changes was "substantial." For example, he found that the new law was "a subterfuge to enact drastic cuts in both the standard of need and level of payment"; that in New York City the net effect of the law will result in increases in assistance to 245 families and decreases to approximately 173,900 families; and that "the decrease in total AFDC payments under the New York State program is no less than \$75,000,000" annually. On the evidence before the district court, these findings were justified and were surely not "clearly erroneous." Indeed, my brothers do not challenge them. While appellants originally took the position before us that there was no real reduction in the standard of need, no amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments. The crucial question is whether doing so violates a congressional directive contained in section 602(a) (23).

Before consideration of that issue it is helpful again to focus on the basic concepts here involved. There are a number of hypothetical ways for a state to affect welfare payments. It can raise or reduce its standard of need, concluding that a greater or lesser sum is sufficient for subsistence. Whether it pays as benefits 100 per cent, or some lesser percentage, of that standard of need, a change in the standard changes the actual payments. A state can also keep its standard of need constant, but change the percentage of that standard which it will pay. Or a state can leave both its standard of need and level of benefits intact in theory, but impose a flat dollar maximum on the amount

going to any one family or adjust the amount of an existing maximum. Section 602(a)(23) refers to changes in "amounts used . . . to determine . . . needs" or in "maximums . . . on the amount of aid paid"; it does not specifically refer to a change in the percentage of the standard of need that a state pays.

I come now to the question of what section 602(a)(23) was designed to accomplish. The language clearly calls for an increase in standards of need and in dollar maximums to take account of an increase in the cost of living of which Congress, like the rest of us, was clearly aware. Ordinarily, an increase in either would cause an increase in money benefits paid out by the state. However, this effect could immediately be negated by any of the devices described above, i.e., by then reducing the standard of need after having increased it, or by reducing the percentage of benefits paid, or by reducing dollar maximums. New York has utilized the first technique and appellants would attribute to Congress the intention of requiring an increase in the standard of need but not caring whether it is thereafter promptly reduced. Even the brief of the United States Department of Health, Education and Welfare, relied on in footnote 6 of the opinion of Judge Hays, appears to balk at such outright nullification of section 602(a)(23).

⁷ Thus, the brief notes:

If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living cost. The second sentence of the regulation seeks to foreclose this possibility

Appellants' position attributes to Congress an intention to appear as though it were accomplishing a result which it knew was not being achieved. I am reluctant to presume that to be the case. The language of section 602(a)(23) means something, it certainly calls for an increase in standard of need, thereby suggesting an increase in benefits, and I do not see why it also simultaneously suggests its own nullification. The legislative history relied on by Judge Hays is inconclusive. It shows that the admi- n bill originally sought a greater increase in benefits (squirement that all states pay 100 per cent of need, a... an annual cost of living adjustment. That something less emerged does not prove that nothing at all was done; if anything, it tends to show the reverse. Appellants argue that Congress could not have enacted even a temporary "floor" on benefits with so little discussion. But undoubtedly such instances have occurred before. While of some weight, the absence of discussion can hardly be controlling. In his opinion granting the preliminary injunction Judge Weinstein painstakingly outlined the progress of section 602 (a) (23) through Congress in reaching his determination as to the congressional purpose behind it. He noted that the inadequacy of present welfare payments throughout the states was repeatedly stressed as the motivation for the proposed legislation, and that although additional provisions originally proposed with the section were dropped, the wording of the basic requirements of section 602(a)

and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

To adjust maximums on the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23) [section 602(a)(23)], and would not constitute compliance with that section.

(23), and presumably the purpose behind it, emerged virtually unchanged.*

Section 602(a)(23) is now the subject of litigation in a number of courts. Prior to this case, the only other federal judge who has undertaken an analysis of the section concluded that it prevented a cut in benefits. In Lampton v. Bonin, - F. Supp. - (E.D. La. 1969), a three-judge court was convened to determine the validity of a ten per cent reduction in AFDC grants by the Louisiana Department of Welfare, which plaintiff recipients attacked on a number of grounds, among them that the reduction violated section 602(a)(23). In a decision rendered in April 1969, two of the three judges held that the question was premature, since the state had until July 1, 1969 to comply with the statute. — F. Supp. at —. In a lengthy dissent, Cassibry, J., did reach the merits of the issue, and concluded that the section prohibited any reduction in benefits even before July 1.

Congress necessarily intended to maintain at least the status quo by setting a floor below which ADC payments could not be reduced, which is certainly the level of ADC payments on January 2, 1968, the base figure from which the increases required by section 402(a) (23) [section 602(a)(23)] are to be determined. Though this prohibition on reductions is not expressly stated in the statute, it is necessarily implied, for any other conclusion is "plainly at variance with the policy of the legislation as a whole."

ADC payments in all states are predicated upon the need standard; if this standard is increased, as section

See Rosado v. Wyman, — F. Supp. —, — (E.D.N.Y. 1969). See also note 9, infra.

402(a)(23) requires, the budgetary deficit must also increase accordingly. In those states paying the budgetary deficit in full, as well as in those states that pay only a percentage of the budgetary deficit (or the standard of need), section 402(a)(23) necessarily requires increased ADC grants correspondent to the increase in the standard of need, for a percentage maximum (100 percent or less) kept constant automatically translates increased need into an increased payment. Similarly, in those states imposing an arbitrary dollar maximum on the size of the assistance grant, section 402(a)(23), by requiring that the maximums imposed be adjusted in accordance with the change in the cost of living, insures increased grants for all recipients. Regardless of which system of computing ADC payments the state follows, section 402(a)(23) is therefore designed to effectuate increased ADC recipient grants. The language of the statute could not be any clearer. __ F. Supp. at ___.

More recently, a three-judge court in Texas considered the issue whether a cut in AFDC benefits violated section 602(a)(23). Although the opinion of the court has not yet issued, its judgment has; the latter indicates that the court unanimously concluded that a reduction in benefits violates the federal statute. Jefferson v. Hackney, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969).10

⁹ The dissenting opinion also carefully analyzed the legislative history of section 602(a)(23) and concluded, as did Judge Weinstein, that though not voluminous the history of the section clearly evinced a congressional intent that state AFDC payments be increased. — F. Supp. at ——.

¹⁰ See also Williams v. Dandridge, 297 F. Supp. 450, 464 (D. Md., 1968), where the three-judge court noted in dictum:

As it shows on its face, \$213(b) [section 602(a)(23)] was designed to increase benefits to keep pace with increased living costs.

In both cases, the statutory issues were whether Congress intended by section 602(a)(23) to put at least some floor under welfare payments, and whether the state statute ran counter to that intention. In neither instance did the state legislation reduce a standard of need; rather, the mechanism used to lower benefits was primarily a reduction in the percentage of payment applicable to that stand. ard." Even though that legislative device is not mentioned at all in section 602(a) (23), both Judge Cassibry and apparently the Texas court felt that the federal statute prevented indirect as well as direct evasions of congressional intent. In this case, the action of the State of New York is in even sharper conflict with section 602(a)(23) because, according to the trier of fact, New York has done the one thing that the section is undeniably designed to prevent; i.e., the State has directly reduced the standard of need despite the admonition of the section to adjust that standard "to reflect fully changes in living costs." Indeed, New York has reduced the standard—and therefore the benefits paid -to a level below the standard in effect for most recipients before any cost of living adjustment.

I do not suggest that the meaning and effect of section 602(a)(23) are unmistakably clear. But, on balance, I think that its language and the legislative history relied on by Judge Weinstein show that Congress intended AFDC payments throughout the country to be increased somewhat to reflect the rise in the cost of living and that the levels of payments so adjusted were to remain stationary

¹¹ Apparently both Louisiana and Texas formerly paid on a basis of 100% of their standards of need, subject to dollar maximums on the amount of sid to any family. After increasing its standards to comply with section 602(a)(23), Texas evidently reduced its percentage payment to 50%; Louisiana merely cut all grants by 10%, including those grants based on dollar maximums. See Lampton v. Bonin, supra,

— F. Supp. at — , — & n. 16.

at least pending further congressional action. That this intention was far from unreasonable is sufficiently demonstrated by the fact, supported by ample evidence on the record below, that even in New York State, which has one of the highest levels of AFDC benefits in the United States, AFDC recipients live at or below a bare subsistence level. Accordingly, I conclude that since New York has not complied with section 602(a)(23) properly read, the injunction was justified.

III. Dissolution of the three-judge court.

The last issue concerns the appeal from dissolution of the three-judge court. I think that there is a very substantial question as to whether the court was correct in holding that the amendment to section 131-a rendered plaintiffs' constitutional claim either "moot" or "unripe." Plaintiffs very persuasively argue that the only effect of the amendment was to grant purely discretionary administrative power to increase the level of Nassau County payments and that the mere possibility that such discretion might be exercised to cure an allegedly prohibited discrimination is far from sufficient to void the constitutional issue. Nor is it at all clear that the subsequent increase of the Nassau County payment schedules retrospectively corroborates the dissolution of the three-judge court, since plaintiffs assert-and defendants do not deny-that the increase still fails to bring Nassau County levels of payment up to those in New York City. Cf. the recent convening of a three-judge court in Rothstein v. Wyman, No. 69 Civ. 2763 (S.D.N.Y., July 7, 1969).

Moreover, my view is that the three-judge court should have decided the statutory question which concededly remained in the case before it. All of the reasons referred to in Part I of this opinion for the exercise of pendent jurisdiction by Judge Weinstein alone applied to the threejudge court. In addition, dissolution of the court allowed the argument to be made—and to be accepted—that the jurisdiction of the three-judge court had disappeared. It would have been quicker, simpler and more appropriate to the kind of pressing issues before that court if it had exercised its power to the fullest.

If I thought that the dissolution of the three-judge court completely divested Judge Weinstein of all jurisdiction then I would regard the decision to dissolve as an abuse of discretion and would dissent on that ground too. However, as Part I, *supra*, indicates, I do not attach that consequence to dissolution and, accordingly, need not go that far.

APPENDIX I

Order of the United States Court of Appeals for the Second Circuit Denying Application for Stay of Mandate Pending Application for Stay to Mr. Justice Harlan

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of July, one thousand nine hundred and 69

JULIA ROSADO, et al.,

Plaintiffs-Appellees,

v.

GEORGE K. WYMAN, individually and in his capacity as COMMISSIONER OF SOCIAL SERVICES FOR THE STATE OF NEW YORK, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Defendants-Appellants,

(and 2 other cases).

It is hereby ordered that the motion made herein by counsel for the appellees by notice of motion dated July 18,

1969 to stay issuance of the mandate pending consideration of an application for a stay to Mr. Justice Harlan be and it hereby is denied.

> /s/ J. Edward Lumbard /s/ Paul R. Hays

I dissent WILFRED FEINBERG
Circuit Judges

Pra-

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ges

IN THE

JOHN F. DAVIS, O

Supreme Court of the United States

OCTOBER TERM, 1969

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABBOM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents
Office & P. O. Address
80 Centre Street
New York, New York 10013

Samuel A. Hirshowitz First Assistant Attorney General

PHILIP WEINBERG Principal Attorney

Amy Juviler
Assistant Attorney General
of Counsel



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,*

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The memorandum and order of the Hon. Jack B. Weinstein, District Judge (E.D.N.Y.), dated April 23, 1969 which denied the defendants' motion to join the Depart-

^{*}This suit was originally entitled National Welfare Rights Organization, et al. v. Wyman, et al. That organization, lacking standing to sue, was stricken as a party plaintiff by order of the District Court dated April 23, 1969 (Document No. 17 of the Index of the original Record on Appeal in the Court of Appeals).

ment of Health, Education and Welfare as a necessary party defendant is set forth in "Appendix to Petition for Certiorari, Motion to Expedite and Jurisdictional State ment", Nos. 1539 and 1540, O.T. 1968, submitted by peti. tioners to this Court last term (1a).** The memorandum and order of the Hon. Jack B. Weinstein, District Judge dated April 23, 1969 striking the National Welfare Rights Organization as a party plaintiff is not in issue herein. It is Document No. 17 in the original record on appeal in the Court of Appeals. The memorandum and order of the Hon. Jack B. Weinstein, District Judge, dated April 24 1969 convening a three-judge court and issuing a temporary restraining order is set forth at 4a. The memorandum and order of the three-judge District Court dated May 12 1969 dissolving itself is set forth at 10a. The opinion in support of the issuance of a preliminary injunction by the Hon. Jack B. Weinstein, District Judge, dated May 15. 1969 is set forth at 14a. The opinion and order of the Hon. Jack B. Weinstein, District Judge, granting plaintiffs' motion for summary judgment is set forth in an appendix to the petition for certiorari at 39aa.* order of this Court dismissing petitioners' appeal from the dissolution of the three-judge court and refusing to grant certiorari before judgment is found at 37 U.S.L.W. 3492. The opinion and order of the United States Court of Appeals for the Second Circuit dated July 16, 1969 vacating the preliminary and permanent injunctions, reversing summary judgment and affirming dissolution of the three-judge court is set forth at 45aa. The opinion of Mr. Justice Harlan referring petitioners' application for interim relief to the full Court has not been published.

^{**} References to the aforementioned appendix are designated "-a".

^{*} Numbers followed by "aa" refer to the appendix to the instant petition.

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1), 2101(c) and (f).

Questions Presented

- 1. Did the District Court have jurisdiction over the validity of the New York statute based on its asserted non-conformity with 42 U.S.C. § 602(a)(23) where no plaintiff's anticipated reduction in welfare payments approached \$10,000 and no deprivation of any civil right of the plaintiffs was asserted?
- 2. Did New York comply with 42 U.S.C. § 602(a) (23) by increasing its standard of need for welfare recipients to fully reflect increases in the cost of living?
- 3. Would the alleged non-compliance with the Social Security Act, governing federal grants in aid to the states, warrant a declaration of invalidity of a state statute which establishes levels of welfare payments?

Statutes Involved

The pertinent provisions of the Social Security Act (28 U.S.C. § 602[a][23]) and of the New York State Social Services Law § 131-a (Chapter 184 L. 1969 and Chapter 411 L. 1969) are set forth in the petition at pp. 5-9.

Statement of the Case

Proceedings Below

The instant action was brought by petitioners to invalidate a new section of the Social Services Law of New York State governing the levels of public assistance which was

enacted by the New York State Legislature on March 3, 1969 to take effect on July 1, 1969. The purpose of the suit and effect of the preliminary and permanent injunctions issued by Judge Weinstein was to force the State to revert to its earlier administratively set levels and methods of payment which had been established pursuant to § 131. Two challenges to the statute were made—first, that the new statute allegedly did not comply with 42 U.S.C. § 602(a) (23), a section of the Social Security Act governing the eligibility of states for grants in aid for dependent children, and secondly, that the new statute in establishing higher levels of payments to recipients within New York City than those outside the city constituted a denial of equal protection.

The case was brought on by an order to show cause signed by Judge Weinstein and served on respondents on April 10, 1969 returnable before the same Judge on April 15, 1969. On that day without conceding the substantiality of the federal question, respondents moved to convene a three-judge court pursuant to 28 U.S.C. § 2281. On April 21, respondents moved to join the Secretary of Health, Education and Welfare as an additional party defendant pursuant to Rule 19(a) of the Federal Rules of Civil Procedure. On April 23, 1969 the District Judge denied the latter motion and on April 24 he issued a temporary restraining order and granted respondents' motion to convene a statutory three-judge court (4a ff). Both sides moved for summary judgment and the three-judge court (MOORE, C.J., MISHLER, D.J. and WRINSTEIN, D.J.) heard argument on May 2, 1969.

On that same day the Legislature passed an amendment to subdivision 4 of § 131-a which was signed by the Governor on May 9, 1969. The new section permits the Commissioner of Social Services to raise the levels of payment in any county to that paid to New York City recipients and authorizes the Board of Supervisors of any county to request such an increase (Pet. p. 9).

By order dated May 12, 1969 that Court dissolved itself on the ground that the constitutional issue had become mooted by the amendment to § 131-a (10a ff). Judge Weinstein promptly issued another temporary restraining order, this one enjoining enforcement of the statute, despite the uncontroverted showing by plaintiffs that suspension of § 131-a might require the State to pay out \$10,000,000 each month more than the amount payable pursuant to § 131-a—an amount completely irretrievable once disbursed (Tr., April 23, 1969, pp. 124-125).

On May 15, 1969 Judge Weinstein issued his preliminary injunction against enforcement of the statute (14a ff). That decision, although ostensibly granting a preliminary injunction, in fact ruled against the validity of the state statute in every important respect and effectively nullified it, stopping just short of an express order to that effect. Judge Weinstein held that § 602(a)(23) was not a narrow statute but one of revolutionary proportions which effectively "precludes" New York from changing its existing welfare program.

The District Judge found "a number of independent bases for concluding that jurisdiction exists" over plaintiffs' claims (16a) and held it "clear that at the time the three-judge court was convened jurisdiction existed pur-

^{*}Petitioners suggest that respondents sought passage of this amendment in order to moot the instant litigation (Pet. p. 14). This contention has repeatedly been made orally and has consistently been denied by respondents. Since it was the motion of respondents that convened the three-judge court for the reasons for which 28 U.S.C. § 2281 was originally enacted—to protect a state from having a statute declared unconstitutional by one District Judge chosen by plaintiffs—it was not in the interest of respondents to moot the constitutional claim and cause the dissolution of the three-judge court. In fact, it was petitioners' political representatives who wrought the legislative changes.

suant to [28 U.S.C. § 1343(3) and 42 U.S.C. §§ 198; 1988]" (17a). He then found that when the constitution issue was mooted and the three-judge court which had jurisdiction over it was dissolved, there still existed pendent jurisdiction over the statutory claim (16a-20a).

The District Judge also claimed jurisdiction under 28 U.S.C. § 1331, even though that section requires that "the matter in controversy exceeds the sum or value of \$10,000." He acknowledged that the claims of individual petitionen may not be aggregated to satisfy that statute, Snyder v. Harris, 394 U.S. 332, reh. den. 394 U.S. 1025, and that none of the anticipated reductions of any of the petitionen approached \$10,000 (22a). But he used § 1331 as a basis for jurisdiction through the novel suggestion that "indirect damage" to the plaintiffs could occur if reductions in their welfare grants caused malnutrition so severe as to retard "their children's physical and mental development" (22a).

Having found jurisdiction to review New York's legislation, the District Court construed § 602(a)(23) as deserving a "broader construction than that given by the Department of Health, Education and Welfare." He held that it required every state to increase the level of welfare payment (51a). Furthermore, he read the changes in New York's Welfare Law as a diminution of its standard of assistance (38a-42a).

On May 21, 1969 the Court of Appeals granted respondents' motion for preference for their appeal and denied the motion for a stay of the preliminary injunction without prejudice to renewal at the time of argument. The appeal was argued on June 4, 1969 and on June 11 the Court of Appeals stayed the injunction pending the disposition of the appeal.

The next day Judge Weinstein informed the parties that the material referred to in his May 16 opinion

must be produced by Monday, June 16, 1969 and that the parties appear before him on Wednesday, June 18 for a hearing on the motions for summary judgment. On June 16 the Court of Appeals denied petitioners' motion to vacate the stay and also denied respondents' motion to stay proceedings in the District Court pending disposition of the appeal from the preliminary injunction.

On June 17 petitioners appealed to this Court from the order of dissolution of the three-judge court. They also sought a writ of certiorari before judgment and a motion to expedite. On June 18, while appeals were pending before this Court and before the United States Court of Appeals for the Second Circuit, the District Court granted summary judgment for petitioners and issued a permanent injunction. On that day respondents filed a notice of appeal to the Court of Appeals. On June 19 the Court of Appeals granted respondents' motions to stay the permanent injunction and to consolidate the appeal from the permanent injunction with the appeal from the temporary injunction on the original briefs.

On June 24 this Court dismissed the appeal from the dissolution of the three-judge court for want of jurisdiction indicating that it was properly appealable to the Court of Appeals. This Court also refused to grant certiorari before judgment and denied the motions to expedite review and vacate the stays. 37 U.S.L.W. 3492. Petitioners thereafter appealed to the United States Court of Appeals from the order dissolving the three-judge court and that appeal was also consolidated before the United States Court of Appeals.

On July 16, the Court of Appeals rendered its decision, reversing the temporary and permanent injunctions and affirming the dissolution of the three-judge court.

New York AFDC Program

One of the errors underlying the instant cause of action is the assumption that the Social Security Act set up a national program for aid to dependent children and that aid to dependent children in New York is a federal program administered by the State. Actually, the individual states have set up 50 diverse programs and they each have applied for federal contributions which are dispersed, as a practical matter, at higher rates the lower the State's level of assistance (App. 128a [Exh. M], 187a-188a). 42 U.S.C. § 601-603.

Welfare in New York long preceded the Social Security Act of 1935 and the State program has always outpaced federal requirements. Indeed, the rate of assistance provided by the Congress in the District of Columbia (\$184 per month for a family of four) is far lower than that provided by New York (\$278 per month for a family of four) (App. 128a [Exh. C]). The State Board of Social Welfare was established in 1927. New York's Public Welfare Law of 1929 changed the emphasis in welfare legislation from institutional care to providing for care of the needy in their own homes. It was the model for the federal program, rather than the creature of it. This is not past history. New York still pays the highest level of benefits per AFDC recipient in the country and spends the most money per capita population on aid to dependent children (App. 140a [Exh. H. I]).

For decades New York has mandated public welfare officials, "insofar as funds are available for that purpose, to provide adequately for those unable to maintain them-

^{*} The reference "App. —a" refers to the appendix submitted by respondents in the United States Court of Appeals for the Second Circuit. Pages 128a and 140a of that appendix each contain a number of exhibits which had been annexed to an affidavit submitted in support of respondents' motion for summary judgment. These exhibits are differentiated by reference to their exhibit number, as for example, "Exh. M" in the above citation.

selves" and to determine the adequacy of assistance provided "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities" (Social Services Law § 131 [1, 3]). Pursuant to this statutory standard, the New York State Department of Social Services has established items of basic need and levels of payment administratively and, from year to year, conducted cost-of-living surveys and adjusted such standards and levels in accordance therewith. 18 N.Y.C.R.R. § 352.4. Thus in August, 1968, the Department, employing United States Bureau of Labor Statistics cost-of-living figures, as well as its own statistical material based on its actual pricing of items throughout the State, readjusted the schedule of grants (App. 114a-115a, 128a [Exh. A]).

The resultant standard of need was calculated and the State divided into three areas, with standards varying by a few dollars per month depending on utility costs. Monthly cash allowances, exclusive of rent and fuel for heating (which are added separately to each recipient's payment), were calculated based on the number of persons in the family and the age of the oldest child, computed in two-year intervals (App. 115a, 118a, 128a [Exh. B, F]). Thus, in the area denominated "SA-1" (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties), a family of four received an allowance ranging from \$152.00 where the oldest child was five or under to \$221.00 where the oldest child was sixteen or over.

The 1969 Legislature in enacting § 131-a made three substantial changes in New York's public assistance program. It set levels of payment legislatively, rather than

^{*}Section 131a and its predecessor, § 131, deal with levels of assistance for all public assistance recipients, not just for aid to families with dependent children who are, however, the majority of all welfare recipients in the State (886,860 of 1,210,601 welfare recipients in 1968 [App. 125a]). In New York City 657,089 received AFDC relief out of a total of 889,262 welfare recipients.

administratively; it averaged the age of the oldest child thus eliminating age differentials in determining the level of aid to each size family and it eliminated the special grant procedure. However, all of these important changes are based on the 1968 revised standard of need. There was no arbitrary lowering of prices of components or elimination of items from that standard.

Legislative, as opposed to administrative, enactment of public assistance levels in New York was necessary be cause the magnitude of the welfare appropriation. proposed budget for 1969-70 contained \$1.170,000,000 for welfare out of a total budget of \$6,147,000,000. \$321,125, 000 was earmarked for AFDC. Executive Budget, pages m8, m19, 786 (Record on Appeal to Court of Appeals Document No. 48). The number of AFDC recipients has been sky-rocketing. In New York City, the number went from 360,000 to 600,000 between January, 1966 and July, 1968 (App. 128a [Exh. L]). In the State as a whole, the number increased from 763,000 in 1967-68 to 917,000 in 1968-69 and is projected to increase to 1,096,000 in 1969-70 (Executive Budget, supra, p. 779). In this period of increasing numbers and increasing standard of living, it is to be expected that the Legislature would wish to schedule the payments itself, in order to more efficiently plan its budget.

The elimination of age differentials and special grants greatly simplified New York's program of assistance. This simplification had been suggested by the Department of Health, Education and Welfare to all the states as early as February 5, 1964 (App. 228a-231a). It was also proposed by the State Department in its 1968 report to the Governor concerning the revamping of the Welfare Law in order to stop the vicious cycle of poverty that has seemed to envelop its recipients (App. 232a-236a).

The age differential that had been used to determine the level of assistance to each family was frequently the cause

of administrative delay in increasing the family's benefits as the oldest child reached a new level. It also created inequities since some families might mostly young children and one older child and some families have children of a moderate age clustered together. The Department never determined the age of each recipient for purposes of determining its standard of need, but used the age of the oldest child and assumed that each of the other children was progressively two years younger.

Section 131-a eliminated that differential and provided a specific amount depending only on the number of children in the family. This amount was computed on the basis of the 1968 standard of need and the 1968 figures on the age of families actually receiving welfare. The mean age of children in families participating in the AFDC program was calculated in a chart (App. 118a-121a, 128a [Exh. E, F]) which indicated that, for example, in a family of four the mean age of oldest child was 10.09 years (App. 128a [Exh. E, F]), so that the average monthly allowance (again exclusive of rent and fuel) received by AFDC families after the adoption of the August, 1968 cost of living adjustment was \$191.00. The amount provided in 1968 for a family of each size in cases where its oldest child was of that mean age was then adopted as the standard allowance for that size family. Where the mean age contained a fraction the older age was used. To this sum was added \$17.00-the amount necessary to bring the allowance up to \$3,535.00, the federal annual subsistence level for New York City for a family of four (App. 118a-119a, 128a [Exh. F]), or a monthly allowance of \$208.00 plus heat and fuel for heating as actually paid. The allowance for the remainder of the state was determined at a differential of \$25.00 for a family of four (App. 119a). A new amendment to § 131-a permits the other welfare districts to be increased to the New York City level if the cost-of-living figures so dictate. As the computations of the Department show, these levels, based on the previous allowance including the cost-of-living increases of 1968, will result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children (App. 120a-121a).

The method chosen by New York to eliminate age differentials was that suggested by the Department of HEW (App. 229a):

"For example, if the family of 3 in a given State is most frequently composed of an adult, a child of 7 to 12 and a child of 13 to 18 use the food cost figures best suited to those ages, as they appear in the U. S. Department of Agriculture publication . . ."

The third change involved the elimination of "special grants" which is not related to the standard of need at all. Those grants are defined in 18 N.Y.C.R.R. § 3525. They were for non-recurring expenditures and only given when necessity was shown. They were not regularly available as the level of assistance.

Again HEW specifically suggested the abolition of special grants (App. 230a-231a):

"The practical problem in the effective use of the special need items is the lack of equity that results because of the variations among workers in knowledge, attitudes, and even available time, together with the variations among recipients in knowledge of what they can ask for. The net effect is that in some States certain recipients' needs are fairly substantially met, whereas others may receive only the minimum amounts.

"Perhaps a more equitable, liberal (for total caseload), and simple method is to have realistic money amounts in the standard of requirements for basic needs without the individualization of special needs. A differentiation can be made for different living arrangements, such as variations in costs for room and board, restaurant meals, or nursing home care." It must be recognized that there existed a wide disparity in the real levels of welfare payments throughout the state (App. 120a). The special grant system militated heavily in favor of the more aggressive or sophisticated welfare recipient. The size and frequency of special grants varied enormously according to locality and according to the vagaries of individual caseworkers and welfare administrators as well as the assiduousness with which such special grants were requested by recipients. This approach was rejected as outmoded and unfair by every serious commentator in the field, and specifically condemned by the Department of HEW (App. 228a-231a). The Legislature had a right to consider these criticisms of the existing system of administratively established levels of special grants and to substitute therefor a flat-grant approach which would eliminate disparities in actual benefits received due to factors unrelated to need.

The New York standard of need includes, as we have shown, rent, which is a major component although not encompassed in the § 131-a schedule, since it varies with the amounts actually paid by each family. It is undisputed that rents have increased during the period 1968-1969 (App. 121a). These substantial increases in rent-13% in New York City in the past three years-represent an increase in the standard of need and in the actual level of payment to welfare recipients in New York over and above the levels set in § 131-a. In addition, many items previously provided by special grants are being provided by the Department of Social Services on a "purchase of services" basis (App. 121a; Tr. April 23, 1969, pp. 158-60). This means that the Social Services Department directly pays for a service such as moving, homemaking, etc. where there is special need.

The Federal Program

New York, like every state, receives federal funds through the AFDC and other programs administered by the United States Department of Health, Education and Welfare (herein "HEW") under the Social Security Act (42 U.S.C. 55 601, et seq.). This program, established in 1935, provides certain minimal requirements which the States must meet in order to be eligible for participation therein. Although 601 requires the Secretary of HEW to approve state plans, there is no federal regulation which governs the amount a State must pay to its recipients. This is dramatically demonstrated by the chart showing the enormous disparity in sums actually paid by the various states under their AFDC programs-ranging from \$71.75 per average recipient in New York, through \$58.25 in New Jersey (the next highest State) to \$8.50 in Mississippi (App. 140a [Exh. I]). The legislative history of the Social Security Act (S. Rep. 628, 74th Cong., First Sess. 4 [1935]) candidly notes that "[1]ess Federal control is provided than in any recent Federal aid law." As this Court noted in King v. Smith, 392 U. S. 309, 318-319, "each State is free to set its own standard of need and to determine the levels of benefits by the amount of funds it devotes to the program."

In 1968 Congress added to § 602(a) the provision on which this suit was based. That sub-section provides:

"(23) [The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established and any maximums that the State imposes

^{*} Social Security Act sections will be referred to herein as § 601, § 602, etc., their numbers in 42 U.S.C. Section 601 is also known as § 401 of the Social Security Act; § 602 is § 402, etc.

on the amount of aid paid to families will have been proportionately adjusted."

The bill originally introduced by HEW (H.R. 5510, 90th Cong., 1st Sess.) which emerged as § 602(a) (23) contained requirements that all states, by July 1, 1969, pay a benefit equivalent to their full standard of need, which many states now fall short of doing. In fact 28 states pay less than their own professed standard of need (App. 128a [Exh. C]. The bill also required each state to review its standards annually. As enacted, however, § 602(a) (23) is a statute with modest objectives which must be construed strictly in light of its language, its legislative history, and the nature of the system of which it is a small part.

The primary clause requires an updating of the standard of needs. The standard of need is the prerequisite for the states to receive federal funds under the Social Security Act. It comprises the amounts that are necessary for a family to live at subsistence level in that state. It does not govern the level of payments made by the state. The standard of need determines eligibility for welfare in the various states. Thus, an expansion of the standard of need expands the number of people eligible for welfare. However, it does not in any way affect the level of payments.

Petitioners place reliance on the secondary clause of sub-section 23 dealing with requirement of a proportional adjustment in "any maximums . . . paid to families." The Court below properly held that this clause did not apply to New York at all since it has no maximum on the amount paid to families (58a-59a). The Court below cited

^{*}In Alabama the standard of need for an AFDC family of four, including rent, is \$177.00 but the actual amount paid is only \$89.00. And in Missouri, the standard of need of \$305.00 exceeds New York's, but the actual amount paid is only \$124.00, while New York pays its full standard of need—\$278.00. Mississippi pays \$55.00 (128a [Exh. C]).

the authoritative interpretation of § 602(a) (23) by the Department of Health, Education and Welfare which is found in its amicus curiae brief (App. 187a-227a) submitted in the Louisiana case of Lampton v. Bonin, — F. Supp. — (E.D.L.A. Civ. No. 68-2092-E, 1969).

HEW relies heavily on the legislative history of subsection 23 in demonstrating the Congress meant it to have only a modest result (App. 199a-200a, 212a-216a). The elimination of the requirement that states pay their full standard of need actually cut the heart out of the proposal. When that is combined with the elimination of annual updating of the standard of need it is clear that the statute on which petitioners rely cannot be interpreted to have the revolution result on the federal program which they advocate.

Three external factors also support this interpretation. As Judge Hay's indicated, Congress attached no importance whatsoever to its passage (59a-61a). Furthermore, there was no appropriation authorized to cover the bill despite the fact that the original proposal carried a \$60,000,000 appropriation. Furthermore, the dissent in the Senate illustrates that § 602(a) (23) had as its supporters those who favored a limited welfare program and as its opponents those who favored a broader welfare program. Originally, when the Senate bill provided for annual updating, the dissent consisted of Senators Bennett, Curtis, Holland, Stennis, Thurmond and Williams (Delaware). When the House version emerged from the conference committee, those Senators were in the majority approving the bill, and the dissent consisted of Senators Brooke, Case, Harris, Hart, Javits, Kennedy (Massachusetts), Kennedy (New York), Metcalf, Mondale, Nelson, Proximire Tydings, Williams (New Jersey), and Yarborough.

Contemporaneously in Congress limitations on, rather than expansion of, welfare expenditure were in the ascendant. In 1968, it enacted subsection (d) to 42 U.S.C. § 603.

This has been called the "welfare freeze" because it withdraws federal funds from any state to the extent that there is an increase in the number of AFDC recipients relative to the total population after January 1, 1969. Yet, by requiring higher standard of need by July 1, 1969, Congress expected a corresponding increase in the number of people eligible for AFDC aid.

Thus, petitioners' suit is placed in its proper perspective. It seeks to overrule a change in the level of assistance by a State which provides a relatively high level of assistance to welfare recipients. It seeks to use as its lever a section passed by a Congress which restricted, rather than expanded, levels of assistance as an addition to a program which was never federal in character.

Reasons for Denying Certiorari

1. The decision below was clearly correct.

There is wholly lacking any substantial basis for petitioners' claim. The basic reason for this Court to refuse certiorari is that the decision of the Court of Appeals was clearly correct and beyond plausible challenge. That decision turned largely on a finding that the District Court lacked jurisdiction to hear the case. The majority decision is written by Judge Hays. Chief Judge Lumbard differs with the opinion in a very limited respect. Judge Feinberg dissents on reasoning directly parallel to Judge Weinstein's. Despite this apparent split in opinion, Judge Hays' reasoning is convincing. His analysis of all the jurisdictional bases, except for pendent jurisdiction, is concurred in by the Chief Judge and his discussion of 28 U.S.C. §§ 1331 and 1343 is beyond reproach (53a-57a).

Judge Hays and Chief Judge Lumbard dealt with the issue of pendent jurisdiction in the same way and their conclusions are different only in form. Judge Hays holds

that there was no jurisdiction and Chief Judge Lumbard found the exercise of jurisdiction by Judge Weinstein an abuse of discretion. Nonetheless the factors influencing both are the same. Both recognize that the only reason for the joinder of the secondary claim (the differential in payment between New York City and Nassau County) was to confer jurisdiction on the District Court to review the primary statutory claim. This is truly "wagging the jurisdictional dog by his non-jurisdictional tail." See United States v. General Insurance Co., 247 F. Supp. 543, 546 (N. D. Cal. 1965). It should be noted that petitioners never sought the convening of a three-judge court nor did they seek adjudication of the equal protection claim at all (Tr. April 18, 1969, pp. 111-14).* Indeed the named petitioners have an internal conflict of interest with regard to the secondary claim. The New York City petitioners benefit from the alleged inequality of which the Nassan County petitioners complain.

Another factor relied on by both Judge Hays and Chief Judge Lumbard is the fact that jurisdiction over the secondary claim existed only in the statutory three-judge court, not in the District Court which sought to exercise jurisdiction pendent to it. When the new statute was passed and the secondary claim became moot, all jurisdiction lapsed. Finally, both Judge Hays and Chief Judge Lumbard relied on the primacy of the administrative agency in the area of compliance with Social Security Act. Both felt that HEW should have an opportunity to utilize its expertise in reviewing New York's new statute.

^{*}While it is true that subsequent administratively set differentials have recently been declared unconstitutional for recipients of Aid to the Aged, Blind and Disabled (Rothstein v. Wyman, — F. Supp. — [S.D.N.Y. Civ. No. 69-2763, Aug. 4, 1969]), the effect of that holding is to equalize the payments of a relatively few recipients with those to the greater number of New York City residents who receive slightly more. Here, in its statutory cause of action, petitioners sought total invalidation of the levels of public assistance.

Thus, there is no real difference between the two judges on the question of pendent jurisdiction. And they correctly interpreted this Court's decision in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, as supporting respondents' position. In that case this Court expressly stated (383 II. E. at 726-727):

"Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surerfooted reading of applicable law. Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals."

These criteria are particularly relevant here where the primary claim was barred by the Eleventh Amendment, was appended to a mooted secondary claim, and the relief sought was extraordinarily drastic.

Since the District Court had no jurisdiction, the allegedly important issues which petitioners seek to raise are not properly before this Court.

It is respondents' position that petitioners' interpretation of 42 U.S.C. § 602(a)(23) in untenable. However, even if petitioners were correct this would not be a proper case for this Court to consider the question. The jurisdictional complications make it impossible for this Court to rule authoritatively on the merits. Parties in other states associated with these petitioners in New York have brought similar suits (e.g., Lampton v. Bonin, supra; Jeffer-

son v. Hackney, —— F. Supp. —— [(N. D. Tex. Civ. No. 3-3012-B-3-3126-B, 1969)]. In these cases the equal protection claims to which the statutory claim is appended might be more substantial and at the very least might not have been moot.

3. New York's program for aid for dependent children fully complies with any reasonable interpretation of 42 U.S.C. § 602(a) (23).

Although Judge Hays found that there was a lack of jurisdiction in the instant case he did examine the merits and found that New York's new statute fully complied with the requirements of § 602(a)(23). Chief Judge Lumbard refused to rule on the merits in light of the jurisdictional disposition of the case, but specifically disavowed the interpretation of the merits found in dissenting Judge Feinberg's opinion (65a). Even if this Court were to believe it could reach the merits of this case it would be inappropriate for it to grant certiorari. It would be ironic for this Court to review New York's AFDC program since this State has long paid 100% of standard of need, and the highest level of benefits per AFDC recipients. Furthermore, the magnitude of the welfare burden which New York independently shoulders is striking. In Jefferson v. Hackney, supra, the three-judge court in Texas was reviewing the benefits received by 136,000 recipients in the State of Texas. In the instant case the federal Courts have been asked to review appropriations for more than 1,000,000 persons (Executive Budget, supra, p. 779). Furthermore, as has been described above, the changes in New York's program do not directly affect the level of assistance which is based on a July, 1968 cost of living increase in full compliance with the requirements of \$602(a)(23).

In order to interpret New York statute as a violation of \$602(a)(23) the latter section must be deemed to have

enacted the most significant welfare law in decades. But, even if that unimportant statute were so inflated, this Court would have to further presume New York's statute invalid in contrast to its familiar rulings to the contrary. E.g., Ferguson v. Skrupa, 372 U. S. 726; Olsen v. Nebraska, 313 U. S. 236, 246.

4. Section 602(a)23 is a relatively unimportant subdivision of the Social Security Act which has already expired.

As the Court below found, Section 602(a)23 is not a proper vehicle for invalidating New York's public assistance program. It is not even important enough to justify an authorative interpretation by this Court, since in effect it expired after July 1, 1969. There seems to be no doubt that Congress and the New York State Legislature will be faced in their new sessions with serious proposals to revise their welfare programs. No one is satisfied with the existing situation. Welfare recipients demand more money. They and others demand a federal program. Other interest groups demand alternatives to what they term "handouts". The President has proposed a program which would eliminate any question posed by this case. He advocates that the federal government guarantee a \$1,600 annual income to every family of four in the United States. If this program were adopted, the federal floor on welfare which petitioners attempt to infer from § 602(a 23) would be legislatively provided. The federal government would also undertake the responsibility for meeting that floor. Perhaps the most obvious factor about such a program would be the extent to which New York exceeded the federal minimum. In any event this is an era of metamorphisis in welfare and it would be inappropriate for this Court to take a position on the levels of payment for the first time when the existing scheme is likely to be altered.

5. Congress did not create a role for the judiciary with respect to governing levels of payment by states to recipients of AFDC relief, and there is no necessity for one where the Department of HEW has promptly proceeded administratively under its statutory mandata.

Even if § 131-a were in conflict with § 602(a)23, that statute would not be invalid except as an acceptable plan for receiving AFDC funds from HEW. Petitioners do not raise a claim of constitutional deprivation. The federal AFDC program provides for grants-in-aid. It does not purport to preempt the field of welfare from the states. No one can claim that Congress has sought to occupy this field. Indeed, it has deliberately avoided a national plan for welfare and has refused to establish national standards, although it is a national problem. Obviously the Act does not contemplate a judicial determination of non-compliance.

Grant-in-aid programs, in general, and the AFDC sections of the Social Security Act, in particular, regulate the relationship between the federal agency and the state government and do not directly create justiciable issues between an individual and the state government. This is not a case where there has been extended inaction by the agency. Compare King v. Smith, supra. The Court of Appeals held that at least in the first instance the administrative agency should assess the complicated factual issues with which the Court below was grappling. See Secretary of Agriculture v. Central Roig Refining Co., 338 U. S. 604, 618. Also see United States v. Western Pacific R. Co., 352 U. S. 59; Crain v. Blue Grass Stockyards Co., 399 F. 2d 868, 871 (6th Cir. 1968); United States v. Manufacturers Hamover T. Co., 240 F. Supp. 867, 882 (S.D.N.Y. 1950).

It is undisputed that HEW has commenced its own administrative proceeding to determine whether § 131-a conforms to the Social Security Act's provisions (App. 130a-138a). It has requested appears to provide detailed information regarding the statute and, pursuant to 42 U.S.C.

i 601, must determine whether the statute conforms to federal standards for eligibility to receive federal funds. The Court of Appeals properly held that HEW is the federal administrative agency with primary jurisdiction here and the Courts should defer to its expertise in this area.

Petitioners' claim that the letter to New York State from Mr. Callison of the HEW's regional office indicates completion of the administrative proceeding and constitutes a finding that the New York State statute is invalid (Pet. pp. 17n. 5, 30) is unnecessarily snide and totally incorrect. The letter has been answered and HEW is continuing its investigation in a careful, judicious manner appropriate to the seriousness of the issues. The posture of this case is in sharp contrast to the situation in King v. Smith, where HEW had for years approved the Alabama regulation which was challenged. Here HEW must for the first time determine itself, irrespective of this litigation, whether § 131-a meets its requirements for eligibility in the federal progam, subject to judicial review. Even in King v. Smith, this Court expressly noted (392 U. S. at 312, fn. 3) that "we intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts."

We are sure the state would comply, as it always has, with any disposition by HEW which became final. The essential philosophy underlying the Social Security Act reflects a philosophy that the States should have virtually full power over their own welfare programs and a desire on the part of Congress to avoid the full responsibility which a truly federal program would impose. A judicial role in enforcing an existing statute could not cure the fundamental weakness of the statute. In fact the cure might be worse than the disease. It also would involve a severe encroachment on the power of the Legislature into the very heart of its essential prerogative—the control of

the purse strings. The order sought by petitioners would direct the New York Legislature to appropriate more money, not indirectly through the transparent device of naming the Commissioner as defendant as the District Judge held (59a), but directly. This is not a case in which the administrative officer who is the named defendant may lower the amounts available to individual recipients in order to spread existing funds. On the contrary the subject matter of this statute is the levels of payment themselves.

As we have noted, § 602(a)(23) deals principally with standards of need and has only a peripheral effect on levels of payment. In light of the permissive federal system which allows shockingly low levels in some jurisdictions (see King v. Smith, supra, at 319 n. 15), its language must be strictly construed. The diversity by which the federal government determines its level of contribution to the various states is not in any way related to the level of payments and is certainly not designed to produce the highest level. For instance, New York receives the lowest possible Federal contribution, although it pays more per AFDC recipient than any other state.

At the present time there is no floor on welfare payments mandated under the federal statute. Congress has appropriated \$184.00 per month for a family of four in the District of Columbia (New York provides \$278.00 per month for a family of four (App. 128A [Exh. "C"]). The Bureau of Labor Statistics subsistence level of \$3,535 for a family of four is explicitly met by § 131-a (App. 118A-119A, 128A [Exh. "F"]). The only standard New York is accused of failing to meet is its own previous standard. It would constitute an invasion of the legislative power to require the State to nail to its masthead forever whatever scheme happened to be in effect on January 2, 1968. See Securities & Exchange Commission v. Chenery Corp., 332 U. S. 194, 200-201 (1947).

An interpretation of § 602(a) 23 that would hold New York's substantial level of payments invalid while allowing other states to pay small fractions of New York's amount might, itself, raise a problem of equal protection to New York citizens. This Court must deal even-handedly with citizens of all states. Yet petitioners would have it impose on New York's already unfairly burdened taxpayers an even greater load. The federal statute could not be read to impose the additional responsibility on enlightened states such as New York to retain and compound the generous benefits paid, while at the same time effectively freezing the less than generous amounts paid by citizens of other states to the needy.

The interpretation of § 602(a) 23 sought by the petitioners involves an unreasonable call for the exercise of the power of judicial review of state action in the area of welfare benefits. It is an effort by petitioners to have this Court implant social philosophy, not of the legislative branch, but of petitioners and more particularly their social advocates. Such judicial legislation was expressly condemned in a well reasoned opinion by Judge Frankel for a three-judge court in Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), affd. 393 U. S. 323. The welfare policy sought to be enacted by plaintiffs in that case was of a far more limited sort than that sought here, yet that three-judge court restrained itself in deference to the legislative branch:

"The plain flaw that nonetheless destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.

Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us. * * •

It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.' Lochner v. State of New York, 498 U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us. including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. * * *

The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality." (Id. at 862, 863.)

The petitioner's contentions (and the District Judge's order) mandated the payment of the additional tax monies by New York although, as this Court pointed out in King v. Smith, supra, relied upon by petitioner, the effect of non-compliance—the withdrawal of federal funds—would be a matter to be pursued by the federal agency.

Moreover, the essential fact in King was that the regulation under challenge was part of a state plan approved by HEW. Thus, resort to that agency would be idle and accordingly the majority of this Court affirmed the issuance of the declaratory judgment, leaving it up to the

state officials to choose between having the right to receive federal funds and retaining their regulation.

Here, not only has HEW not passed upon the conformity of New York's statute to the Social Security Act, which question is initially committed to its administration, but it was not made a party to the litigation (although respondents moved to add HEW as a necessary party) and, as we have pointed out, that the injunction issued by the District Judge permitted no flexibility to the state.

Indeed, the fact that the validity of this statute is not properly before this Court required dismissal of this action since plaintiffs have failed to join a responsible official of HEW. New York's eligibility for federal aid is the only proper issue raised by the alleged conflict between §602(a)(23) and §131-a. Thus, without a responsible federal official, "a final decree cannot be rendered between the other parties * * * without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." Turner v. Brookshear, 271 F. 2d 761, 764 (10th Cir. 1959); see Fed. R. Civ. Pro. 19(a)(1). The Judge denied defendants' motion to join the Federal Government. But an order depriving New York of federal funds would have to run principally against HEW and only secondarily against the New York officials.

Motion to Expedite

If this Court grants certiorari, respondents take no formal position on the motion to expedite. Nonetheless, the severe time limitations on respondents up until now have prevented us from doing the depth of research warranted by this case. Respondents request, at the very least, 30 days to prepare their brief after petitioners have filed theirs. Furthermore, respondents also request that this case be heard on a printed record since the issues are so complex and the exhibits so important.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be denied.

Dated: New York, New York, October 1, 1969.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondents

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Samuel A. Hirshowitz First Assistant Attorney General

PHILIP WEINBERG Principal Attorney

Amy Juviler
Assistant Attorney General
of Counsel

FILED

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IN THE

Supreme Court of the United Statems area

October Term, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHEYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE ANNEXED BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PEOPLE FOR ADEQUATE WELFARE

FLOYD SARISOHN
Counsel, People for Adequate
Welfare
67 Harned Road
Commack, New York 11725
(516) 543-7667



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IN THE

Supreme Court of the United States October Term, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHEYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE ANNEXED BRIEF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS

People for Adequate Welfare respectfully moves the Court for permission to file the attached brief amicus

curiae, for the following reasons. The reasons assigned also disclose the interest of the amicus.

The Suffolk County, New York organization known as People for Adequate Welfare (hereinafter P.A.W.) is a voluntary membership organization, serving some 46,000 welfare recipients in a suburban county comprising the Eastern half of Long Island. The organization, an affiliate of the National Welfare Rights Organization, now in its second year of operation, is currently seeking status as a Membership Corporation of the State of New York. It has as its primary purpose the promotion of welfare rights in Suffolk County.

As such, P.A.W. has by painful experience become thoroughly familiar with the impact and the ramifications of the cutbacks in public assistance grants promulgated by the New York Legislature in March, 1969, which is the subject matter of this suit. P.A.W. has been in constant contact with the Suffolk County Commissioner of Social Services, the Chairman of the Suffolk County Board of Supervisors, and the Speaker of the New York State Assembly, with regard to the effects of the cutbacks and the response of the people in Suffolk County thereto.

Since P.A.W. has for a membership only persons who receive public welfare assistance, the magnitude and significance of the issues under consideration in this action which affects "all other persons similarly situated," is of direct and vital importance to this organization. Prior to this application no party to this action resided in Suffolk County nor was any P.A.W. member a party. Therefore,

the brief submitted by Petitioners in this action will not necessarily reflect the position nor express the arguments of this organization or the welfare recipients it represents. P.A.W. believes, therefore, that this organization's position merits the attention of this Court and should appropriately be presented in the form of a brief amicus curiae.

Counsel for the Petitioners-Appellants have consented to the filing of a brief amicus curiae by the movants (see Exhibit A). The present motion is necessitated since the counsel for the Respondents-Appellees have stated that they shall neither consent nor oppose the submission of a brief amicus curiae by the movants (see Exhibit B).

WHEREFORE, movants pray that the attached brief amicus curiae be permitted to be filed with the Court.

Respectfully submitted,

FLOYD SARBOHN
Counsel, People for Adequate
Welfare
67 Harned Road
Commack, New York 11725
(516) 543-7667

Exhibit A

[LETTERHEAD OF]

CENTER ON SOCIAL WELFARE POLICY & LAW COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK 401 West 117th Street

New York, N. Y. 10027

(212) 280-4112

October 14, 1969

Floyd Sarisohn, Esq. 67 Harned Road Commack, Long Island 11725

Dear Mr. Sarisohn:

Pursuant to Rule 42(2) of the Rules of the Supreme Court, Petitioners in Rosado, et al. v. Wyman, no. 540, O.T. 1969, hereby consent to the filing of a brief amicus curiae by People for Adequate Welfare, P.O. Box 388, Patchogue, Long Island 11772.

Very truly yours,

Lee A. Albert
Attorney for Petitioners

LAA:js

Exhibit B

[LETTERHEAD OF]

STATE OF NEW YORK
DEPARTMENT OF LAW
State Office Building
80 Centre Street
New York, N. Y. 10013
Telephone: 488-3442

October 20, 1969

Re: Rosado v. Wyman

Floyd Sarisohn, Esq. Sarisohn, Thierman & Sarisohn, Esqs. 67 Harned Road Commack, Long Island

Dear Sir:

This office can take no position with regard to your application to file a brief *amicus curiae* in the United States Supreme Court in the above case.

Very truly yours,

Louis J. Lefkowitz Attorney General

By PHILIP WEINBERG
PHILIP WEINBERG
Principal Attorney

PW:lac

IN THE

Supreme Court of the United States October Term, 1969

No. 540

Julia Rosado, Lydia Hernandez, Majorie Milby, Sophia Abrom, Ruby Gathers, Louise Lowman, Eulia Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PEOPLE FOR ADEQUATE WELFARE

Preliminary Statement

This case presents a fundamental challenge to the right of a state to legislate in disregard of federal law. Specifically, New York State, through the State Commissioner of Social Services, is charged with participating in the benefits of the Social Security Act of 1935, as amended, 42 U.S.C. §601 et. seq., without adhering to the requirements for participation in that Act and further, with legislating in direct contravention of that Act's mandates.

New York State's act of non-compliance with the federal law, an act motivated by the State Legislature's desire to save some 75 to 100 million dollars in fiscal 1969-70, works a devastating hardship upon the 850,000 mothers and needy children in New York dependent on Aid to Families with Dependent Children (AFDC). The effect of New York State's effort to save money at the expense of its poorest citizens, amply documented in the record of this case, is to promote nutritional, mental, physical and emotional deterioration and a consequent increase in the rate of mortality of those affected. The secondary effects upon the children, such as educational retardation, is incalculable.

ARGUMENT

I

New York State has expressly disregarded the Federal Social Security Act of 1935, as amended by Congress in 1967, since the amounts used by the state to determine the needs of individuals have not been adjusted to reflect fully changes in the cost of living.

The Federal Mandate, 42 U.S.C. §602 (a) (23)

Recognizing that the federal purposes underlying the Aid to Families with Dependent Children (hereinafter AFDC) program were being undermined by inadequate grants and that rising welfare rolls threatened even further reductions in grants, Congress in 1967 imposed a significant requirement on the states toward the end of "increasing income of recipients of public assistance." S. Rep. No. 844, 90th Cong., 1st Sess. (1967), U.S. Code Cong. & Admin. News, 2834, 3132 (1967).

Section 213(b) of Public Law 90-248, Social Security Amendments of 1967, added a new state plan requirement as a condition for participation in the AFDC program—Section 402(a)(23) of the Social Security Act of 1935, as amended, 42 U.S.C. §602(a)(23) (hereinafter §602(a)(23)). This section requires each state to:

"provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." The implementing regulation and interpretations of the Department of Health, Education and Welfare (H.E.W.) confirm that the clear requirement of this provision is that all states increase "the amounts used to determine needs of individuals" by July 1, 1969, to reflect fully increases in the cost of living since such amounts were last established prior to January 2, 1968, the date Section 602(a)(23) became law, up to July 1969. 45 C.F.R. 233.20(a)(ii), 34 Fed. Reg. 1392. The brief amicus curiae submitted by H.E.W. in Lampton v. Bonin, - F. Supp. - (E.D. La., 1969) (App. p. 189a), indicates that Section 602(a) (23) operates as a freeze against cutbacks, when the cost of living rises. The section, hence, requires the states to readjust their standards of assistance or "the amounts used by the state to determine the needs of individuals" to reflect fully changes in the cost of living by July 1, 1969.

"Standards of Need"

Under the old as well as the new law, each state is federally required to establish a state-wide need standard "to identify needy individuals and to establish the amount of assistance to which an individual is entitled." 42 U.S.C. §602(a)(1), H.E.W. Handbook of Public Assistance Administration, Pt. IV, §4120. This standard must be expressed in monetary amounts for each consumption item or group of items included in the standard. 45 C.F.R. 233.20(a)(ii), 34 F.R. 1392 (1969). Thus, each state defines its standard of need in terms of the amounts of money which it considers to be the cost of food, shelter, clothing, household supplies, utilities and other items which it deems necessary for subsistence. That standard, whatever it was at the date of this amendment, is controlling in measuring

the necessary adjustment for cost of living in arriving at an updated standard of need.

The burden of Section 602(a)(23) is, therefore, that states must, using their own standards of need in effect at the time of this amendment, re-express, in monetary terms, those standards so as to reflect changes in the cost of living. The states may not suddenly redefine their standards of need to a lowe: level or subtract from the items deemed necessary for subsistence and hence claim a technical compliance with the amendment by pointing to their level of payment in relation to their reduced standard of need. 45 C.F.R. 233.20(a)(ii), 34 Fed. Reg. 1392. Since, estimated conservatively, the cost of living in New York increased 10.1% from May, 1967 through July 1, 1969, the amendment contemplates at upward adjustment in New York's standard of need. (See, Affidavit of Dr. Abraham Burstein, App. 23aa).

This amended section of the Social Security Act is a departure from previous Congressional policy which allowed the states wide latitude in determining standards of need. Congress now requires states, without subtracting from the composition of their standard as defined by them at the time this amendment became effective, to adjust the standard to accord with the cost of living as of July 1, 1969. While a departure, the amended section's import is clear, nonetheless, and "a restrictive interpretation should not be given a statute nerely because Congress has chosen to depart from custom." United States v. Sullivan, 332 U.S. 689, 693, 68 S. (t. 331, 334 (1948).

The majority opinion by Circuit Judge Hays, in the ruling below, is that since the schedules of payment in

Section 131-a are based on prices as of May, 1968, New York has complied with Section 602 (a)(23) (App. H, p. 61). Such an interpretation is logically impossible, given a constant standard of need which is adjusted in the context of a rising cost of living. Attention, therefore, should be directed at the actions taken by New York with particular emphasis on Section 131-a of the New York Social Services Law.

New York's Non-Compliance with Federal Law

New York, as of January 1, 1968, prior to the effective date of Section 602 (a) (23), had a fixed standard of need. That is, New York had determined in monetary amounts the sums required by individuals to live at a subsistance level. Included in New York's standard of need were universally recurring items administered under a regular "flat grant." These included: food, personal incidentals, utilities and other necessities. 18 NYCRR §352.4. Recognizing that the amounts deemed necessary for regular recurring needs are not sufficient to cover special needs of recipients, New York, in addition, set forth the money amounts to cover expenses such as initial or replacement expenditures for clothing and home furnishings, expenses incident to maternity and childbirth, medically required special diets, travel expenses for employment or medical reasons, school lunch allowances and so on. The combination of these "special grants" and the universal "flat grant" comprises New York's standard of assistance or need standard. 18 NYCRR 353.1 (c).

Pursuant to its authority prior to the enactment of New York Social Service Law, §131-c, the State Department of Social Services determined the monetary amounts for the above components of need on the basis of pricing done in May, 1967. (N.Y. Soc. Serv. Law §131-c.) The projected cost of living increase in New York from May, 1967, to July, 1969, is 10.1%. (Supra, p. 11.) The standards of need in effect as of January 2, 1968, the enactment date of Section 602(a) (23), must therefore be increased by 10.1% to comply with the federal mandate.

In May, 1968, New York repriced the monetary amounts reflecting the state's standard of need so as to slightly increase those amounts. This repricing cannot, as held in the court below, be construed as compliance with Section 602 (a) (23) for several reasons: (1) The overall sense of Section 602 (a) (23) requires an updating in the standards of assistance so that the standard in effect on July 1, 1969 will reflect fully current living costs. New York's repricing in May, 1968 makes no provision for cost of living increases from May, 1968 through July, 1969. Given the relatively steady upward cost of living curve, a projection to reflect cost in July of 1969 should have been made by New York at the time of repricing. (2) Even if the New York adjustments of May, 1968 were deemed sufficient to comply with Section 602 (a) (23), New York through Section 131-a has nullified that May adjustment and abolished the increase it previously made in plain violation of Section 602 (a) (23). The states are required to continue to utilize the standard of need once it has been adjusted upward to reflect rising living costs until such time as the cost of living decreases so as to justify a concomitant downward adjustment of standards. (HEW, Amicus Brief, App. A. at 21-22.) (3) New York, through Section 131-a, not only rescinded the May 1968 cost of living adjustment, but acted in patent

disregard of the federal cost of living adjustment mandate by approving drastic reductions in public assistance expenditures. These circumstances necessitate a closer examination of New York Social Services Law, Section 131-a.

New York Social Services Law, Section 131-a

New York Social Services Law §131-a, L. Ch. 184, March 31, 1969, was enacted as part of the budget of the State of New York for the fiscal year 1969-70. The New York Legislature in Section 131-a abolished the prior administrative practice of making annual adjustments for specific cost of living changes including, most critically, the adjustment for this year reflecting an additional 7% increase since May, 1968. Instead, the Legislature redetermined the content of the standard of needs and the amounts of aid to be paid. This redetermination resulted in an overall reduction in total AFDC expenditures (federal, state and local) of some 21 percent from the projected expenditures at current levels.

First, the amounts of the regular, recurring payments to families of specific sizes for their fundamental needs are no longer related to the actual age of the oldest child in each family but are standardized sums based on a mean age of the oldest child in all recipient families of that size, an adjustment which results in sharp reductions in regular grants to many families with older children. The effect of a standardized schedule ignoring age derived from a differentiated schedule of grants based on age is a failure to pass on to recipients the full increase of the appropriate cost of living factor applied to the amounts used on January 2, 1968 to determine the needs of recipients.

Second, grants to cover expenditures for clothing and home furnishings are abolished and almost all previously existing "special grants" to cover extraordinary needs such as medically required diets, maternity expenses, homemaker services, school lunch money and the like are eliminated.

The violative aspects of New York Social Services Law §131-a are punctuated by the fact that, in addition to providing schedules of payment which hardly reflect compliance with an upward adjusted standard of need, the new law in fact consolidates and deminishes the previously state-defined standard of need—in direct disregard of federal law and regulations.

H

New York Social Services Law, §131-a, violates the 1967 amendment to the Federal Social Security Act since the New York law effects a consolidation and reduction in the standard of need for welfare assistance contrary to the prohibition of the federal law and regulations.

The Federal Prohibition

The Department of Health, Education and Welfare regulations issued pursuant to Section 602 (a) (23) expressly provide with respect to the federally mandated state adjustment to standards of need that:

"In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction of the content of the standard." 45 C.F.R. 233.20 (a) (2)(ii), 34 F.R. 1394 (1969).

New York's Actions

As under prior practice, New York, in the new provisions of Section 131-a, purports to pay its full standard of need, i.e., whatever amount is determined necessary for subsistence living, New York pays 100% of that standard, unlike some states which profess to pay only a percentage of their standard of need. Hence, the New York Social Services Law provides that the "schedules shall be deemed to make adequate provision for all items of need * * * exclusive of shelter and fuel for heating * * *" (Section 131-a).

Since the schedules of payment in Section 131-a amount to a reduction in aid for a majority of the welfare recipients, and since New York does not claim to be simply paying a lesser percentage of her standard of need, the reduction in aid can only be translated as a consolidation and reduction in the standard of need itself, accompanied by a prohibition on the local welfare agencies from paying more than is now, under the new lowered standard, deemed necessary. Further, the total exclusion of special grants to meet particular family needs under Section 131-a, flatly violates the requirement of the federal regulation that "a consolidation of the standard (i.e. combining of items) may not result in a reduction of the content of the standard." 45 C.F.R. 233.20(a) (2) (ii), 34 F.R. 1394 (1969). That there has been a reduction in content is most obvious with respect to items which were previously provided for in expressed terms and are now expressly eliminated. Such items include: additional regular allowances for the aged, disabled, pregnant women, expenses incident to employment or training, special diets, allowances for oversized clothing, allowances for telephones and extra grants for diaper washings. Also, prior to the 1969-70 budget, the special irregular grants were issued on the basis of individually verified need for such expenses as: major items of clothing, furniture, fumigation, door locks, replacement of lost or stolen checks, layettes, establishment of a home and so on. Under the new legislation, allowance for all of these items is abolished and social services officials are prohibited from making grants in excess of the schedules of maximum monthly grants and allowances set forth in the statute.

New York has, in short, devised a new standard of need in violation of Section 602(a)(23). Indeed, the manner in which this new standard was determined violates a long-standing federal requirement, confirmed in 602(a)(23), that need standards be determined in relation to "facts • • established as to the money amounts necessary to secure • • • economic security for people in need • • • "(H.E.W. Handbook of Public Assistance Administration, Part IV, Section 4120).

III

New York Social Services Law, §131-a, even if deemed a "ratable reduction" pursuant to the interpretation of the Department of H.E.W., violates the Federal Social Security Act of 1935, as amended, since such reductions contravene the clear meaning of the federal law and the intendment of Congress.

The Department of Health, Education and Welfare propounds an interpretation of Section 602 (a)(23) which would permit states technically to comply with the Social Security Act amendment while at the same time reducing the actual amounts paid to individuals. Thus, H.E.W. has said:

This interpretation permits states to make "ratable reductions" which simply means that they pay a smaller percentage of their standard of need.

Assuming, arguendo, that New York attempted to justify its reduced welfare payments on this basis—even though such a position would squarely conflict with the statement in Section 131-a that the "schedules shall be deemed to make adequate provision for all items of need • • • "—Section 131-a would still violate federal law since Section 602 (a) (23) contemplates no percentage reductions on the amount of need paid by the states.

The Congressional Intent

Though this prohibition on reductions is not expressly stated in the statute, it is necessarily implied, otherwise, a state could reduce the mandated adjustment in standards of need to a mere formality and completely obliterate the inexorable effect of Section 602 (a) (23) to raise the level of recipient grants. Any other conclusion is "plainly at variance with the policy of the legislation as a whole." United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543, 60 S.Ct. 1059 (1940), and "that which is implied in a statute is as much a part of it as that which is expressed." United States v. Jones, 204 F. 2d 745, 754 (7th Cir. 1953).

H.E.W. seeks to infer a Congressional sanction of percentage reductions from the failure to mention them in Section 602 (a)(23). However, because a percentage payment kept constant automatically transfer the increase in the standard of need into an increased payment, it is not at all surprising that Congress did not refer to percentage reductions in Section 602 (a)(23)—there simply was no need to in order to achieve the desired increases.

"In the interpretation of statutes, the function of the courts * * is to construe the language so as to give effect to the intent of Congress." United States v. American Trucking Ass'ns., Inc., Supra, and a court will "not suppose that Congress intended to enact unnecessary statutory amendments," Uptagrafft v. United States, 315 F. 2d 200, 204 (4th Cir., 1963) or presume "that the legislature intended any part of a statute to be without meaning." General Motors Acceptance Corporation v. Whisnant, 387

F. 2d 774, 778 (5th Cir. 1968). To accept the H.E.W. interpretation of Section 602(a)(23), permitting ratable reductions, would render the section a vestigial remnant of surplusage.

It is well to recall that the Social Security Act Amendments of 1967 were introduced toward the end of "increasing income of recipients of public assistance." S.Rep. No. 744, 90th Cong., 1st Sess. (1967), U.S. Code Cong. & Admin. News, 2834, 3132 (1967). As the opinion of District Court in this action indicated:

"The language of the basic requirements of 402 (a) (23) remained virtually unchanged throughout its legislative evolution. There is no hint from either committee that it intended to change the purpose of the section as expressed by Administration spokesmen. Hence, there is no reason to believe that Congress failed to appreciate the import and plain meaning of the language in 402(a)(23)." (Opinion in Support of the Issuance of a Preliminary Injunction of Hon. Jack B. Weinstein, District Judge, dated May 16, 1969—App. 50a).

CONCLUSION

For all of the foregoing reasons, the judgment of the Circuit Court should be reversed and the order of the District Court affirmed and reinstated.

FLOYD SARISOHN
Counsel, People for Adequate
Welfare
67 Harned Road
Commack, New York 11725
(516) 543-7667

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Supreme Court of the United Staten 1969

October Term, 1969

JOHN F. DAVIS, GLERK

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MAJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE FOR THE CATHOLIC CHARITIES OF THE ARCHDIOCESE OF NEW YORK, CATHOLIC CHARITIES, DIOCESE OF BROOKLYN, COMMUNITY SERVICE SOCIETY OF NEW YORK, FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK, FEDERATION OF PROTESTANT WELFARE AGENCIES

KARL D. ZUKERMAN
Community Service Society of New York
105 East 22nd Street
New York, New York 10010

DOROTHY COYLE
The Catholic Charities of the
Archdiocese of New York
122 East 22nd Street
New York, New York 10010

MILDRED SHANLEY
Catholic Charities, Diocese of Brooklyn
191 Joralemon Street
Brooklyn, New York 11201

PHILIP SOKOL
Federation of Jewish Philanthropies
of New York
130 East 59th Street
New York, New York 10022

LOUIS AGIN
Federation of Protestant Welfare Agencies
281 Park Avenue South
New York, New York 10010

Attorneys for Amici

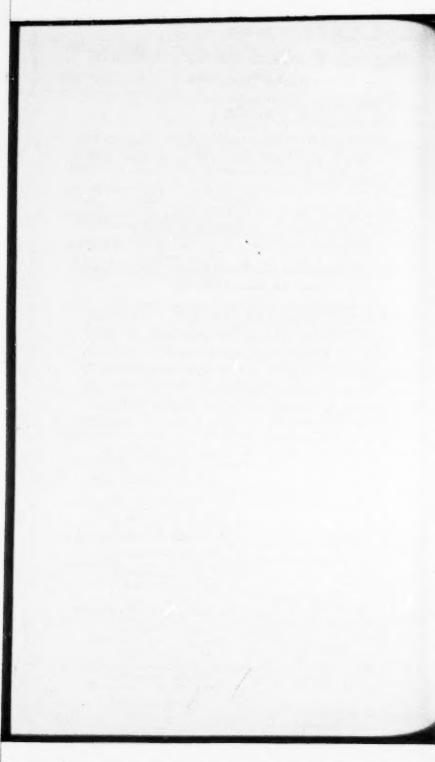


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IN THE

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No. 540

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Interest of the Amici

The Catholic Charities of the Archdiocese of New York was incorporated in 1917 as a charitable federation for the broad purpose of serving the poor and aiding and coordinating the varied health and welfare programs of the Archdiocese which had their beginnings as early as This federation, together with its 203 affiliated agencies expended in 1968 over \$180,000,000 in services for needy families, children and youth, the sick, aged and handicapped. It operates a comprehensive range of health and welfare programs including personal and family counselling, homemaker and community services, general and special hospitals, nursing homes and homes for the aged. institutional, foster home and adoption programs for children, special services for the handicapped, residences. day care centers, children's camps and programs for citizenship training and character development of youth.

Catholic Charities, Diocese of Brooklyn was incorporated in 1931, but its predecessor agency dates from 1889. It, and its 31 member agencies spent about \$54 million in 1968 serving the poor, blind, deaf, retarded, handicapped, aged, troubled, and sick. These services were provided through counseling centers, child care agencies, hospitals, homes for the aged, etc.

Community Service Society of New York is the product of a merger in 1939 of the Association for Improving the Conditions of The Poor and the Charity Organization Society, both of which organizations were created in the 1840's. Spending almost \$5 million annually, its 500 employees provide casework services, group therapy, homemaker services, a residence for older persons, research in family life and social action in the fields of family and child welfare, housing and urban development, health, aging, youth and correction and family life education.

The Federation of Jewish Philanthropies of New York was organized in 1917 and is the coordinating agency in New York City for Jewish social work. Together with its more than 130 affiliated agencies, more than \$250,000,000 is spent annually in providing a complete range of health and welfare services through institutions such as general hospitals, an orthopedic hospital, a hospital for the mentally ill, a hospital for the physically handicapped children, family service agencies, vocational rehabilitation agencies, child care agencies, foster homes and treatment facilities for dependent, emotionally disturbed and mentally retarded children, homes for the aged, community centers, camps, etc.

Federation of Protestant Welfare Agencies was organized in 1921 and now has 235 member agencies. Together, they spend more than \$100,000,000 each year for child welfare agencies, nursery schools, day care centers, camps, treatment centers for disturbed children and for delinquents, neighborhood youth centers, vocational guidance, mental health clinics, narcotics treatment facilities, maternity shelters, homemaker services, family counseling, neighborhood, social recreational and social activities, homes for the aged, etc.

Amici and their affiliates combined, serve more than three million New Yorkers each year. They have had a long-standing concern for and familiarity with the problems for the poor in New York City and State, especially those in receipt of Aid to Families with Dependent Children. The citizen members and professional staffs include physicians, psychiatrists, nurses, psychologists, social workers, clergy, attorneys, and others familiar with the problems of the poor. As the representatives of the major portion of the voluntary health and welfare groups in the City of New York, amici respectfully present their views on behalf of the AFDC recipients upon the case before the Court.

Amici have limited their argument to a documentation of the conditions of which Congress was aware in passing 42 U.S.C. §602(a)(23) and the nature of the damage resulting from New York's non-compliance therewith. They are however, in complete agreement with and subscribe to the other points raised by petitioners in their brief.

The parties have consented to the filing of this amicus curiae brief and copies of their letters of consent will be submitted to the Clerk with the brief.

Summary of the Argument

Congress' enactment in 1935 of what is now known as the Aid to Families with Dependent Children program and 42 U.S.C. 602(a)(23), a 1968 amendment to that program, were both intended to minimize or eliminate what the Congress knew to be the incalculable and permanent consequences of long-term poverty on children, families and society in general.

In enacting §131-a of the New York Social Services Law, the New York State Legislature ignored, in fact violated the requirement of said 42 U.S.C. 602(a)(23) to increase grants to AFDC recipients to reflect fully increases in the cost-of-living to July 1, 1969. As a result, the hardships, suffering and injury which Congress sought to forestall have been compounded in New York State.

The higher mortality and morbidity rates of the poor, the greater frequency of illness, disability, chronic conditions and malnutrition among them, attest to the close relationship between poverty and physical health. The larger presence among the poor of mental retardation and serious emotional disorders speaks to the consequences of peverty for mental health. The absence of conditions condecive to sound child development among the poor results in significantly lower levels of educational achievement and significantly higher numbers of persons unable to function productively as adults. The pressures of severe economic deprivation on all family members reduces appreciably the chances of sound family life and relationships. And the gap between the poor and the highly-visible rest of society serves to perpetuate the cycle of poverty by deepening the despair and hopelessness felt by the poor. All these circumstances not only have a visible effect upon the poor, but also on the well-being of the entire society.

Desiring to help AFDC recipients to catch up to the increased cost-of-living by increasing their grants accordingly, the Congress, as of early 1968, enacted 42 U.S.C. 602 (a) (23). It sought, by this device, to minimize the effects of severe deprivation on present and future generations, at least until major revisions in public income maintenance programs were undertaken.

The evidence is clear that the intent of the New York State Legislature in enacting §131-a was anything but consistent with that of the Congress. They sought merely to reduce welfare costs without considering the consequences of such reductions upon the poor.

The effect of these cutbacks is demonstrated over and over again in the files and records of amici and their affiliated agencies. That already inadequate AFDC grants have been further reduced, with the predictable, but nonetheless deplorable, results is also apparent. That other public programs upon which the poor depend are inadequate to fill the vacuum further intensifies the hardships.

POINT I

Aware of the well-documented body of empirical and theoretical evidence that a real connection exists between poverty and individual, familial and societal pathology, Congress initiated the Aid to Dependent Children (now known as Aid to Families with Dependent Children) program in 1935 and amended it in 1967 to render it more effective.

A. Relationship of Poverty to Pathology

Poverty, especially persistent poverty, affects every aspect of a person's life: his physical and mental health, his development as a child, his family relationships and his relationship to the society around him. And the consequences of poverty in turn intensify each other so that once the chain reaction has begun it is extremely difficult to avoid the irremedial harm which follows and the incalculable toll it takes in human life and suffering.

1. Physical Health

The symbiotic relationship between poverty and ill health clearly exists in the slums of large cities in the United States.

Mortality rates, especially during infancy, childhood, and even the younger adult ages, are higher here than for the rest of the population again, and this most important, especially mortality rates from the communicable diseases.¹

* * * the prevalence of morbidity, impairments, and disability is probably highest * * * among the poverty population for the relatively severe conditions, particularly chronic conditions causing activity restriction for long periods of time. This follows from the higher prevalence of severe communicable diseases as causes of death in the poverty population. However, unlike the situation as regards mortality, where poverty population death rates are higher during the younger years, the prevalence of morbidity, impairment, and disability is likely to be higher for the poverty population especially during the later years of mid-life and old age.²

Twenty-nine percent of persons with family incomes less than \$2,000 have chronic conditions which limit their activity as compared to about 7.5 percent in families with incomes above \$7,000. Even in the age 17-44 group, the poor are affected at twice the rate of the non-poor; in the age 45-64 year old males, the lower income group has three and one-half times as many disability days. A higher per-

^{1.} Lerner, The Level of Physical Health of the Poverty Population: A Conceptual Reappraisal of Structural Factors, 6 MEDICAL CARE 361 (1968).

^{2.} Id. at 363.

cent of persons in poor families have "multiple hospital episodes" and they stay in the hospital longer (10.2 days as compared to 7.3 days). They are more often hospitalized for non-surgical conditions than the non-poor, though they are much less likely to have hospital insurance. Poor children under 15 visit physicians twice a year as compared to 4.4 times for the non-poor; 22 percent have never seen a dentist as compared to 7.2 percent in families with incomes over \$10,000.

Many of the illnesses which the urban poor suffer relate directly to their living conditions. Acute respiratory infections (colds, bronchitis, grippe), infectious diseases of childhood (measles, chicken-pox, whooping cough), minor digestive diseases and enteritis (typhoid, dysentery, diarrhea), injuries from home accidents, skin diseases, lead poisoning in children from eating scaling paint, pneumonia and tuberculosis are typical of the physical illness of the poor.⁴

Furthermore, other diseases and disabilities not apparently related to the physical environment are more common among the poor: degenerative diseases, particularly cardiovascular disorders, chronic diseases such as heart disease and diabetus mellitus, cancer, premature births.⁵

* * * the more easily recognizable and more serious types of chronic illness, including paralysis and ortho-

^{3.} United States Department of Health, Education and Welfare, Delivery of Health Services for the Poor at 3-4 (1967).

^{4.} SCHORR, SLUMS AND SOCIAL INSECURITY 13-14 (1963).

^{5.} Irelan, Health Practices of the Poor, Welfare in Review, Oct. 1965, p. 3.

pedic impairments, accounted for 13.8 percent of reported chronic conditions for the lowest income group as compared with 9.7 for those at the top of the income scale. Even more striking are the differences between the poor and the rich when it comes to visual and hearing impairments. Such handicaps accounted for 12.4 percent of the chronic conditions reported for the \$2,000 group, but only 6.4 percent of such conditions in the group with an income of \$7,000 and over

The role of nutrition in the health of the poor is well understood. Low hemoglobin levels and anemia occur with greater frequency among the poor. Caloric (quantitative) or nutritive (qualitative) deficiencies or both can cause malnutrition. Carbohydrates can, relatively cheaply and quickly, provide calories and energy, but they cannot provide the proteins necessary for proper nutrition. Obesity is a more frequent condition among the poor than among the non-poor.

2. Mental Health

There is a striking correlation between poverty and mental retardation.

The majority of the mentally retarded are the children of the more disadvantaged classes of our society. This extraordinarily heavy prevalence in certain deprived population groups suggests a major causative role, in some way not yet fully delineated, for adverse social, economic and cultural factors. These conditions

^{6.} Coll, Deprivation in Childhood: Its Relation to the Cycle of Poverty, Welfare in Review, Mar. 1965, p. 4.

^{7.} Hillman & Smith, Hemoglobin Patterns in Low-Income Families, 83 Public Health Reports 65 (1967).

^{8.} Id. at 3.

may not only mean absence of the physical necessities of life, but the lack of opportunity and motivation. A number of experiments with the education of presumably retarded children from slum neighborhoods strongly suggest that a predominant cause of mental retardation may be the lack of learning opportunities or absence of "intellectual vitamins" under these adverse environmental conditions. Deprivation in childhood of opportunities for learning intellectual skills, childhood emotional disorders which interfere with learning, or obscure motivational factors appear somehow to stunt young people intellectually during their developmental period. Whether the causes of retardation in a specific individual may turn out to be biomedical or environmental in character, there is highly suggestive evidence that the root causes of a great part of the problem of mental retardation are to be found in bad social and economic conditions as they affect individuals and families * * * 9

A variety of circumstances, all typical of the lives of the poor have been found to lead to mental retardation. There is a close relationship between inadequate prenatal care, typical for the poor, premature births, likewise typical, 10 and consequent mental retardation. 11

In both whites and Negroes, the incidence of prematurity became extremely high the lower the socioeconomic class * * * this [the higher rates for Negroes]

^{9.} REPORT OF THE PRESIDENT'S PANEL ON MENTAL RETARDATION, A PROPOSED PROGRAM FOR NATIONAL ACTION TO COMBAT MENTAL RETARDATION, at 8-9 (1962); see REPORT OF THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MR-68—THE EDGE OF CHANGE, at 19 (1968).

^{10.} REPORT OF PRESIDENT'S COMMITTEE, supra note 9.

^{11.} Address by Lawrence Goodman, American Association on Mental Deficiency Conference, May 16, 1969.

was not a function so much of the Negro as a somewhat racially distinct group, but was more the heritage of prolonged disadvantage in the areas of general health, medical care, education, and nutrition.¹²

Various studies point to the relationship between nutrition and brain growth, 18 maternal malnutrition and toxemia and prematurity, 14 and to the functional integrity of the offspring's nervous system. 15

Given the environmental causes of much mental retardation, one final fact bears noting:

Unlike other major afflictions, such as cancer or heart disease, which often come relatively late in life, mental retardation typically appears in childhood and always before adulthood. And once incurred, it is essentially a permanent handicap, at least at the present stage of biomedical knowledge.¹⁶

But mental retardation is not the only mental health consequence of poverty.

- • emotional upset is one of the main forms of the vicious circle of impoverishment. The structure of the
- 12. Report of the First Conference on Mental Retardation, Mild Mental Retardation in Infancy and Early Childhood, at 28 (Simmons ed. 1966).
- 13. Fernandez, et al., Nutritional Status of People in Isolated Areas of Puerto Rico, 12 American J. Clinical Nutrition (1965); Brown, Organ Weight in Malnutrition With Special Reference to Brain Weight, 8 Develop. Med. Child Neurol. (1966).
- 14. Report of the First Conference on Mental Retardation, supra note 12, at 30.
- 15. Warkany & Wilson, Prenatal Effects of Nutrition on the Development of the Nervous System, in Genetics and the Inheritance of Integrated Neurological and Psychiatric Problems (Hooker & Have eds. 1954).
 - 16. REPORT OF THE PRESIDENT'S PANEL, supra note 9, at 10.

society is hostile to these people * * * the poor tend to become pessimistic and depressed; they seek immediate gratification instead of saving; they act out.17

The classic study Social Class and Mental Illness by Hollingshead and Redlich¹⁸ discloses that the poor's rate of "treated psychiatric illness" is about three times as high as the average for the other social classes. Furthermore, of those who had received some psychiatric treatment, 65 percent in the top four classes (out of five) had been treated for neurotic problems, the rest for psychotic disturbances. Among the poor, 90 percent of those treated had psychotic problems.

What happens to the psyche of the impoverished individual that accounts for the large amount of emotional disturbance that appears to exist?

It is hypothesized that emotional depression may be the prevalent life style of many lower-lower-class members and that this depression (if such it is) has its origins in overwhelming anxiety associated with the almost constant powerful frustrations and threats which surround the slum-dweller from infancy to old age. While both research and theory point to the positive contribution of mild frustration and associated mild anxiety to achievement and to ego-strength, constant and overpowering frustrations make achievement an untenable goal and seriously weaken the ego—or self-esteem • •

With generally less ego strength (lower self-esteem), the very poor individual is apt to have

^{17.} HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES 138 (1962).

^{18. (1958).}

greater need than his middle-class counterpart for security-giving psychological defenses. But defenses such as sublimation, rationalization, identification with the larger community and its leaders, compensation, idealization, and substitution of generally accepted gratifications are not so readily available to him in his impoverished, constricted environment and with his own lack of economic and intellectual resources. • • • for instance, the lower-class adolescent tends to use defense mechanisms in handling aggressive drives and failure fears which require little previous experience, involve maximum distortion, and create social difficulties, whereas middle-class children are more apt to use defense mechanisms which require many skills involve a minimum of distortion and are socially acceptable. . . .

Since the pressures on the lower-lower-class male for unobtainable, occupational success are greater than on the female, it is hypothesized that depressive reactions, confusion over identity, and recourse to the various mechanisms for self-expressive escape would probably occur in a higher proportion of men and to a more pervasive degree. The higher rates among males (especially in the lower-lower-class) of mental Illness, alcoholism, drug addiction, crime and delinquency are, perhaps, associated, at least in part, with factors such as these.19

For the most part, in AFDC families the mother is the only parent in the home. Even if she had been legally married to the father a severe burden falls upon her. She must fulfill both parental roles with their heavy demands.

These demands are overcast and suffered by the emotional impact of the loss or absence of the father on the mother and children. Shifting of roles com-

^{19.} CHILMAN, GROWING UP POOR 31-33 (1966).

bined with the immediacy of inadequate income can play into dependency needs and can be used to feed neurotic tendencies in mothers and their children.²⁰

These difficulties are further intensified when the parent is an unmarried mother. The public image of such AFDC mothers, manifested by periodic attacks in the press, as irresponsible and immoral, has its effects psychologically:

an apathy or resignation, which is the end product of hopelessness, a lowered sense of self-esteem and worth, the product of being held in small account by others, and a heightened sense of being an outsider to the larger society. Sometimes the outcast manages her feelings by indifference, clowning, self-depreciation. Sometimes she strikes out blindly against those who, to her, represent the "ins". * * *

Other social and psychological stresses accompany economic stress. The unmarried mother who keeps her baby finds few avenues of self-expression and pleasure open to her. She is homebound with the care of her baby or she is neglectful of him. She has no husband to whom to express her aggravation or boredom. The baby more often than not causes her to lose a man who might have been a husband someday, if her pregnancy and its consequences had not scared him off, or to lose a man who gave her some sense that she was wanted. So the baby often represents the fruit of her badness or foolishness as well as the betrayal by the man who got her into trouble. Mothering rarely flows warmly and dependably toward the baby thus ruefully or angrily borne.²¹

^{20.} Address by Eunice L. Minton, National Conference on Social Welfare, May 11-16, 1958.

^{21.} Perlman, Unmarried Mothers, in Social Work and Social Problems 275-276 (Cohen ed. 1964); see McCabe, Re: Forty Forgotten Families, 24 Public Welfare 161-163 (1966).

3. Child Development

It is in children that some of the most damaging consequences of poverty can be found. Whether it be from malnutrition, other disease, marital tensions, emotional upset in the home or any other of the common occurrences in the poverty-stricken home, the children of that home suffer deeply.

The infant * * has three sources of security that enable him to feel safe and, therefore, to experience a satisfying relationship with others: (1) consistent physical care and conditions conducive to good health requisite to a feeling of well-being, (2) uninterrupted opportunity to learn and reassuring encouragement to persist in learning through sympathetic attention to his hurts when his first learning efforts endanger his safety, (3) relationships in which he is loved.²²

But the malnourished infant is restless, irritable, hyperactive or apathetic. His crying and whining provokes his mother to show her annoyance by a scolding or a slap, "thus reinforcing the infant's feeling of being unloved." The attention he thus receives prompts him to persist and, unless his mother changes her reaction, the child may become an aggressive, demanding person.

Economic security is important also from the standpoint that the mother, if anxious and harrassed, transmits her disturbed feelings to the infant, perhaps to an even greater extent than when the child is older.²⁴

^{22.} Towle, Common Human Needs 50 (rev. ed. 1965).

^{23.} Id. at 6.

^{24.} Id. at 54; see Herzog, About the Poor—Some Facts and Some Fictions 15 (Children's Bureau Pub. No. 451, 1967).

Because the children receiving AFDC are most often in one-parent homes where the full burden of child-rearing falls on the mother usually, and where the father's absence is itself a loss to the child, the children are "exposed to a greater hazard of having less than average opportunities for development.²⁵ The consequences of this deprivation may be either destructive activities or clinging to infantile behavior. Either course prevents the child from learning how to master his environment, so necessary to his stability in adult life.²⁶

The parental patterns more characteristic of the very poor, in reference to educational achievement, seem to be oriented towards an anticipation of failure, and a distrust of middle-class institutions, such as the schools. Constriction in experience, reliance on a physical rather than a verbal style, a rigid rather than flexible approach, preference for concrete rather than abstract thinking, reliance on personal attributes rather than training or skills, a tendency toward magical rather than scientific thinking: these values and attitudes provide poor preparation and support for many of the children of the very poor as they struggle to meet the demands of the middle-class oriented school.

This theory is borne out by the evidence. Although AFDC children start out on the same level as others, they fall behind so that at about 15 years of age they are a semester or more behind. At each age, a greater proportion of such children were "overage" for their grade, having failed a semester or more. Children who bave failed

^{25.} Meier, Child Neglect, in Social Work and Social Prob-LEMS, supra note 21, at 192.

^{26.} Towle, supra note 22, at 55-56.

^{27.} CHILMAN, supra note 19, at 45.

are more likely to drop out.²⁸ That this has implications for their future independence as adults can be seen by the low level of educational achievement of AFDC mothers,²⁹ and the reduced chances for children's achievement if their parents' education level was low.⁸⁰

The adolescents in economically precarious families are subject to stresses in addition to those normally faced. At a time when they are experiencing a tension between their past dependency and their wish to be independent, the financial uncertainty of the family may cause them to

cling more tenaciously to the parents or, in the interests of survival, be compelled to escape the uncertainties of their family life through an abrupt and premature "cutting off." They may needfully assert their right to keep their own earnings and out of a tragic necessity pursue their own paths unhampered by the burden of the past.³¹

While having to confront the harsh realities of the adult world is not per se a destructive experience, having to do so all at once without adequate past preparation can be quite damaging.³²

Of crucial importance is the way in which the attenuation of values, confusion of identity, and depre-

^{28.} Moles, Training Children in Low-Income Families for School, Welfare in Review, June 1965, pp. 1-2; see McCabe, supra note 21, at 166-167.

^{29.} Coll, supra note 6, at 6-7.

^{30.} Address by Herbert Bienstock, Conference on the Dimensions of Poverty, American Statistical Association, New York Chapter, March 11, 1965.

^{31.} Towle, supra note 22, at 63.

^{32.} Id. at 67-68.

ciation of self-esteem are transmitted from one generation to another. The sense of anonymity, of being the helpless instrument of irresistible and inaccessible social and economic forces, of injustice and anger, of apathy, of despair that conformity to any value system will make life more rewarding, all may have been experienced reactively by adults, as the cultural, political, economic, and social causes began to exert their influence. As these adults become parents, however, their helplessness, blurred sense of identity, and normlessness are presented to their children as models for identification. As the children identify with these aspects of the parents, confusion and normlessness are built into the personality structure of the children. The resulting damage will continue from generation to generation unless changes in the external society and culture intervene to break the cycle and afford new generations more effective models of identification. 85

4. Family Life

There is considerable evidence that the family structure and life of the poor is different from that of the non-poor. Separation, desertion and divorce appear to vary in frequency in inverse proportion to income; the same seems to be true for family size.³⁴ Further, families headed by women are far more frequent among the poor, as are out-of-wedlock births. Differences appear in child rearing

^{33.} Lutz, Marital Incompatibility, in Social Work and Social Problems, supra note 21, at 104.

^{34.} Epstein, Some Effects of Low Income on Children and Their Families, 24 Social Security Bulletin (Feb. 1961); Goode, Economic Factors and Marital Stability, 16 American Sociological Review (Dec. 1951); Orshansky, Recounting The Poor—A Five-Year Review, 29 Social Security Bulletin (April 1966).

practices, with physical punishment and ridicule used more often by the poor.35

To start with, we must keep in mind that above all else, people have minimum basic material needs—sufficient food and clothing, adequate living accommodations and medical care. These must be met. If people are in serious danger of losing the fight for survival they will be unable to use their energy and intellect for the things that enhance life, make it human and rich in heart, mind and spirit. With its basic material needs met, a family can devote its strength to efforts aimed at making itself as sound as possible.³⁶

The past and present circumstances of poor persons work against their chances for successful marital and family relationships.

Husbands and wives on the lowest socioeconomic level tend to have a poorer start in marriage than other couples and the same is true for their children. Many are high school dropouts (over half or more). One result of this is that they are likely to be forced into adult roles earlier than other adolescents. A young person out of school is not given the sanctions for adolescent behavior and the security of protection that students are given. This may be one reason that more of the very poor drift into marriage in their middle or late teens, often following a premarital pregnancy. Added to their youth, lack of education and poor preparation for marriage and parenthood, there is the

^{35.} Bronfenbrenner, Socialization and Social Class Through Time and Space, in Readings in Social Psychology (3d ed. Maccoby, Newcomb and Hartley eds. 1958); Kohn, Social Class and the Exercise of Parental Authority, 24 American Sociological Review (June 1959).

^{36.} Community Service Society of New York, What Makes for Strong Family Life (1958).

likelihood that the young husband will find either a very inadequate job or no job at all. The life experiences that such young couples have had growing up in their own homes and in the poverty environment offer seriously reduced opportunities for a satisfying, stable marriage and family life of their own.³⁷

What happens, psycho-socially, to families with inadequate funds has been considered by many experts in the field. There is general agreement that while inadequate funds will not alone destroy family life, it will tend to enlarge family difficulties. From the psychological perspective,

One may expect more regressive responses on the part of parents in families where there is economic strain. When regression occurs in the adult, it is not as normal an aspect of the growth process as it is in the adolescent. Because the demands of adult life are likely to be more consistently inescapable than those in adolescence and because the personality is more rigidly formed, retreats to more satisfying life periods of the past may bring a more lasting fixation.³⁸

Desertion is a not uncommon phenomenon in the families of the poor. While financial hardship may not be the most important cause of family breakdown, it is an effective fertilizer for the seeds of disruption.

If the partners are incompatible and do not have the same ideals and goals, the tension between them is likely to mount when they live in a cold or overcrowded home and when they do not have enough to eat or to wear. Worry about the future for themselves

^{37.} CHILMAN, supra note 19, at 71.

^{38.} Towle, supra note 22, at 85.

and their children adds to the strain. Desertion, therefore, may represent a desperate attempt on the part of the father to escape responsibilities he cannot meet and to find a means of personal survival.³⁹

For the families receiving public assistance, financial hardship is not significantly alleviated.

The grants support life and physical health if the recipient families manage them well. Indigent families are required to manage their funds more efficiently than everyone else in the population. The opportunity for some margin, some cushion, in the use of money is a powerful antidote to strain in interpersonal relations and intrapersonal conflict. The starkness and monotony of poverty contribute to despair and help to break down whatever abilities married people possess to perform the various functions of marriage, including the rendering of reciprocal emotional support and recognition.

The large amounts of extreme disability — of all kinds — in the public assistance caseload further complicate the family life of the recipients. Even though the effect is significant enough if it is a child who is disabled, the situation is even worse when it is a parent. Considering the inadequacy of the grant normally, having to balance the regular needs of the family and the special needs of the disabled person heightens the difficulty. "It is small wonder that frustration, hopelessness and family discord often accompany prolonged disability."

^{39.} FELDMAN, THE FAMILY IN A MONEY WORLD 67 (1957). Desertion among AFDC families is also caused by many States', though not New York's, refusal to provide such aid where the father is in the home.

^{40.} Lutz, supra note 33, at 83-84.

^{41.} Minton, supra note 20.

In sum, then

5. Social Alienation

Because the poor have very little or no money they are placed at the bottom of society's classification scheme. Since the society tends to measure a person's worth and status by his money, the shortage of money implies a lower value-level for the poor. And since they do not have the content of living of most, the poor tend to be set apart; but they remain affected by the standards of living set by society.

It is an ironical socio-economic fact that the higher our standards of living go, the more the groups with low and fairly static income status becomes disadvantaged and isolated. The effects, therefore, are often a greater sense of personal inadequacy and failure.⁴⁸

For example, the poor do not participate in the social, charitable and fraternal organizations of the American society. And because we consider our society to be a classless one, few organizations are created along class lines. The result is that the poor person, feeling less able to participate, stays away.⁴⁴

^{42.} Lutz, supra note 33, at 101.

^{43.} Minton, supra note 20.

^{44.} HARRINGTON, supra note 17, at 133-134.

The poor have the least voice in government. They lack the vocabulary, the clothes, the carfare, the knowledge, the self-confidence to move institutions to get things done. They lack the skills of knowing how to telephone the authorities, write letters, get up petitions, address public hearings, of whom to call or whom to ask for improvement in their services: better garbage collection, building code enforcement, police

protection. * * *

The point is, the economically deprived are so far removed from the American standard of life that they no longer feel part of the larger society — they feel excluded, isolated, and alienated. The poor believe that they are unable to take advantage of the better things in life, some costing money, but others, like education, free. The best they can foresee is impermanent jobs, bad housing, inferior schools, and few of the conventional pleasures they continually see on television. Forced to live with others like themselves, they learn to accept standard services from police, clinics, schools, sanitation departments, landlords and merchants.⁴⁵

B. Congressional Purpose and Intent

Congress, in its initial passage of Aid to Families with Dependent Children legislation (Title 42 U.S.C. §§601-610), and later, in its amendment §602(a)(23) expressed a clear purpose. In its initiation of a program of comprehensive Federal grants to states who, in setting up state-wide programs of aid to dependent children complied with the requirements laid down in Title 42 of the United States Code §§601-610, Congress explicitly reveals its concern and intent.

^{45.} Address by George K. Wyman, New York State Welfare Conference, Nov. 1968.

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children. 42 U.S.C. 601.

It entered into this program with full recognition that while programs of public assistance were, in the first instance a state responsibility, the magnitude of the problems and their national impact required a federally-based scheme supported by federal monies. So that from 1935 on, and with regular and careful reviews up to 1968, Congress has been deeply involved and concerned with a program of aid for dependent children.

The State of New York instituted a program of aid to dependent children in 1937, expressing at all times an explicit purpose to comply with the Federal requirements. According to the New York State Social Services Law,

§358 Federal aid to dependent children.

The department shall submit the plan for aid to dependent children to the federal security agency or

other federal agency established by or for the purpose of administering the federal social security act for approval pursuant to the provisions of such federal act. The department shall act for the state in any negotiations relative to the submission and approval of such plan and make any arrangement which may be necessary to obtain and retain such approval and to secure for the state the benefits of the provisions of such federal act relating to aid to dependent children. The board shall make such rules not inconsistent with law as may be necessary to make such plan conform to the provisions of such federal act and any rules and regulations adopted pursuant thereto. The department shall make reports to such federal agency in the form and nature required by it and in all respects comply with any request or direction of such federal agency which may be necessary to assure the correctness and verification of such reports. * * *

And an examination of the development of the New York State laws setting up a program for dependent children and the history of their amendments reveals a consistent and systematic course of changes following on the heels of Federal statutory or administrative changes. The New York State Legislature has passed a body of legislation designed for tandem action and conformity with Federal law in this area.

In 1968, mindful as always of the economic changes continuing to sweep the country and the continuing and everpressing needs of those desperately dependent for their well-being on government money, Congress set about to review what changes, if any, were to be made in the Social Security Act. As a result of extensive hearings and testimony, Congress passed, *inter alia*, subdivision (23) of 42 U.S.C. §602(a) effective January 2, 1968 as an amend-

ment to Title IV of the Social Security Act (Grants to States for Aid and Services to Needy Families with Children) as follows:

\$602; State plans for aid and services to needy families with children; contents; approval by Secretary

- (a) A State plan for aid and services to needy families with children must *
- (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Testimony given at hearings before the Congressional Committees drafting this amendment concentrated on the need for improvement of methods calculated to bring payments made to those eligible under the program closer to the cost of the basic needs sought to be covered.46 There

We propose that States be required to update on July 1, 1968, the assistance standards they are now using. From that date on they would have to review these standards annually and modify them with significant changes occurring in the cost of living. Hearings on H.R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess. 259 (1967).

^{46.} Under Secretary of U. S. Dep't of Health, Education and Welfare Wilbur Cohen testified, in part, as follows:

But, it is not enough only to require the States to meet need standards. They must assure that these standards reflect current There is no requirement in present Federal law that State standards be kept up to date. In Colorado, the standards for aid to the permanently and totally disabled have not changed since 1956. Those for the blind have not been changed in Massachusetts since 1956. Wisconsin standards used today for all assistance programs were set in 1958, and Ohio's were set in 1959. Only 25 States have standards that have been brought up to date in terms of recent pricing within the last 2 years.

was extensive evidence that the rapid and significant rise, nationwide, in the cost of living raised serious question of the adequacy of grants being made to the needy families.

Apart from consideration of the knotty problem of basic and sweeping revision of the delivery of welfare aid to the poor in general, it was quickly apparent that in the interim, at least, the states should be required to raise the level of their grants, i.e. monies actually paid out, by a proportion fully reflecting the rise in living costs since the schedules were last established.

There is no doubt, in view of the discussions which took place at the time, that it was the clear intent of Congress, fully mindful of the complexity of the welfare crisis then confronting the states, to effect, at the very least, a real raise in the dollar amount each eligible family would begin to receive. Any state legislative change which followed was not intended by Congress, under any circumstances, to result in a downward revision of dollars actually paid out to any family eligible for such aid.

C. Congressional Knowledge of Relationship Between Poverty and Social Ills

Congress, which has been actively legislating in the field of social legislation for more than thirty years, is probably the best-educated institution existent in the nation with respect to the connection between poverty and those community conditions undesirable and detrimental to life in the United States. As the chief appropriating arm of the government, it also is acutely aware of the changes in cost of living which are, of course, intimately bound up

with the effectiveness of any program aimed at helping people sustain themselves. The governmental agencies charged with administering programs relevant to welfare aid turn out for their own and Congressional use highly developed and detailed information and studies. These are designed to keep Congress accurately informed of the nature of the problems and the effectiveness of programs, including proposals for reform.⁴⁷

Professional writers, sociologists, social workers have also written books and articles which make up an extensive and widely publicized literature on the subject.⁴⁸

^{47.} In addition to those official reports cited elsewhere in this brief, such studies, statements and reports include: PRESIDENT JOHN-SON'S STATE OF THE UNION MESSAGE (1964); Annual Economic Reports to the Congress by the President's Council of Economic Advisors of which the Congress' Joint Economic Committee makes continuing studies; Lampman, The Low Income Population and Economic Growth, Study Paper No. 12, Joint Economic Committee, 86th Cong., 1st Sess. (1959); U. S. DEPARTMENT OF AGRICULTURE. POVERTY IN RURAL AREAS OF THE UNITED STATES, Agricultural Economics Rep. No. 63 (1964); REPORT OF THE PRESIDENT'S AP-PALACHIAN REGIONAL COMMISSION, APPALACHIA (1964); U. S. BUREAU OF THE CENSUS, EXTENT OF POVERTY IN THE UNITED STATES: 1959-1966 (Series P-20, No. 54, 1968); U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FAMILY INCOME AND RE-LATED CHARACTERISTICS AMONG LOW-INCOME COUNTIES AND STATES (1964); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); REPORT OF THE NATIONAL ADVISORY COM-MISSION ON CIVIL DISORDERS (1968); Cohen & Sullivan, Poverty in the United States, Health, Education and Welfare Indicators, Feb. 1964.

^{48.} In addition to those books and articles cited elsewhere in this brief are: Lewis, The Culture of Poverty, National Conference on Social Welfare (1961); CAPLOVITZ, THE HIGH COST OF POVERTY (1963); MacDonald, Our Invisible Poor, The New Yorker, Jan. 19, 1963; MORGAN et al., INCOME AND WELFARE IN THE UNITED STATES (1962); Keyserling et al., Poverty and Deprivation in the United States, The Plight of Two-Fifths of a Nation, CONFERENCE ON ECONOMIC PROGRESS (1962); A. PHILIP RANDOLPH INSTITUTE, A FREE-

In addition, the newspapers and other news media, fulfilling their public requirements have given wide and graphic publicity to social and economic conditions in the poverty-stricken part of our national community.⁴⁹

Finally, the Poor Peoples' March literally took the poor and their problems to the steps of Congress.

All this is cited to emphasize what it perhaps all too obvious, namely, that Congress in legislating a requirement for adjustment in the level of payments to reflect the change in cost of living had as its sole and overriding purpose ameliorating the desperate need of people who could not wait for deeper and more far-reaching reform. It was the intention of Congress that any adjustment which a state made to satisfy the Federal requirement of §602(a)(23) would result in a net dollar increase in the amount paid to each eligible family on its AFDC rolls.

DOM BUDGET FOR ALL AMERICANS (1966); National Tuberculosis and Respiratory Disease Assoc., Poverty and Health, Parts 1 and 2, Jan. and Feb. 1969; MILLER, RICH MAN, POOR MAN (1964); Downs, Who Are the Urban Poor?, Committee for Economic Development Supplementary Paper No. 26 (Oct. 1968).

^{49.} E.g., "Harvest of Shame", CBS Reports, CBS News, Nov. 1960.

POINT II

The passage of Section 131-a of the New York Social Services Law rendered the New York state-plan for AFDC non-compliant with Section 602(a) (23) of Title 42 of the United States Code, part of the Social Security Act.

Section 131-a of the Social Services Law purports to be merely an administrative streamlining of the state's welfare system to counteract "the spiraling rise of public assistance rolls and the expenditures therefore." N.Y. Sess. Laws 1969, Ch. 184, §1. In fact, it has been proven to be a systematic reduction of AFDC grants.

While Respondent Commissioner's original proposals to the Governor regarding welfare reform spelled out a system of flat grants, the bases and schedules upon which the standards of assistance were to be determined were higher than those now called for by §131-a and included items theretofore included as special grants. The Governor, however, "to keep expenditures within available income" recommended a reduction by approximately 5% across-the-board. While the Legislature modified the Governor's proposed budget by granting greater aid than requested for some items, it reduced public assistance categories, Aid to Families with Dependent Children among them, even further.

This legislative history is recited here to bear out Petitioners' contention that passage of §131-a had as its prime

^{50.} STATE OF NEW YORK, EXECUTIVE BUDGET FOR THE FISCAL YEAR APRIL 1, 1969 to MARCH 31, 1970, at p. 739.

motivation a trimming of costs, with the AFDC program to bear a greater portion of the cost-saving than other state programs.

This is further evidenced by subsequent action of Respondent Commissioner, when on September 24, 1969, he authorized a statewide "special necessity grant" for recipients of aid in the adult categories (Aid to the Aged, Blind and Disabled) in response to severe hardships suffered by them in the welfare cutbacks of that spring. But nothing for children and their parents.

The greatest proportion of the public assistance caseload in New York State is the AFDC roll—approximately 75%. Most beneficiaries of the AFDC program in the State of New York live in New York City: 657,000 out of a statewide total of 887,000 was the 1968 monthly average.

The Commissioner of the New York City Department of Social Services of the City of New York stated unequivocally and publicly, that claims that more than 50% of welfare recipients were receiving more money under the new State schedule of payments were false. He said, "At least 75% of the persons in the City of New York are, in fact, receiving less money now than they were before the new grant system went into effect."

So that in the State of New York, a cut-back affecting AFDC payments rather than other forms of aid, results in the greatest possible budgetary gain. It was this fact rather than any other which motivated the designers of the

^{51.} Address by Jack R. Goldberg, "Witness for Survival" Meeting, Sept. 11, 1969.

new system of granting AFDC in New York in the Legislature 1968-1969.

It was common knowledge that since the last re-pricing of the assistance grants as of May 1968, the cost-of-living had increased. From that time until July 1, 1969 the Consumer Price Index in New York City for all items increased 7.08%. 52

Clearly then, the effect of §131-a was directly contrary to the effects intended by the Congress in its enactment of 42 U.S.C. 602(a)(23). Even if what was intended by the Congress was a single adjustment made before July 1, 1969 and current only to the date of the adjustment, New York's single adjustment in May 1968 has more than been wiped out by the provisions of §131-a. The fact is that most recipients in New York City (75%)—and therefore in the State—are receiving grants appreciably lower than those they received under the May 1968 adjustment.

POINT III

Levels of AFDC grants had been grossly insufficient to meet the needs of the recipents and the effects of the reductions caused by Section 131-a of the New York Social Services Law have incalculably worsened the plight of the recipients.

According to the Advisory Council on Public Welfare (appointed by the Secretary of Health, Education and Welfare pursuant to the provisions of 42 U.S.C. 1314),

Public assistance payments to needy families and individuals fall seriously below what this Nation has proclaimed to be the "poverty level." Federal par-

^{52.} United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index.

ticipation in a nationwide program of public assistance payments that are grossly inadequate and widely variable not only perpetuates destitution and intensifies poverty-related problems but also contradicts the Nation's commitments to its poor.

The national average provides little more than half the amount admittedly required by a family for subsistence; in some low-income States, it is less than a quarter of that amount. The low public assistance payments contribute to the perpetuation of poverty and deprivation that extends to future generations.⁵³

This was descriptive of the situation in New York before the enactment of §131-a. Patently, therefore, that section reduced grants already at subsistence to levels of desperation.

A comparison⁵⁴ of the current grants under AFDC in New York City with other relevant standards is revealing in this respect. Using the family of four as a basis for comparison and accounting for increases in the consumer

Spring 1967 \$4,919 July 1969 5,488*

^{53.} THE ADVISORY COUNCIL ON PUBLIC WELFARE, "HAVING THE POWER, WE HAVE THE DUTY" 15-16 (1966).

^{54.} Based on the following memorandum prepared by Miss Edith Taittonen, Director of Home Economics Service of Community Service Society of New York:

COMPARATIVE DATA ON COST OF LIVING-JULY 1969

Three Standards of Living for an Urban Family of Four Persons, Spring 1967, U. S. Department of Labor, Bureau of Labor Statistics.

Family of four—rnan, 38, employed, woman, housewife, boy 13, girl 8

Lower cost standard, metropolitan New York, annual cost of goods and services (excluding tax)

II. A Family Budget Standard, 1963 and Annual Price Survey— Family Budget Costs—October 1968, Community Council of Greater New York.

prices index until July 1, 1969 the following figures are disclosed:

Family of four-man, 38, employed, woman, housewife, boy 13, girl 8.

Annual cost of goods and services (excluding tax)

October 1968 \$6,629.48 July 1969 6,922.50*

Family of four-woman, 34, housewife, boy 12, girl 9, girl 6.

Annual cost of goods and services

October 1968 \$5,473.00 July 1969 \$5,714.91*

Family of four-woman, 34, housewife, children 5, 3 and 1.

Annual cost of goods and services

October 1968 \$4,635.80 July 1969 \$4,840.70*

III. "The Shape of Poverty in 1966", Social Security Bulletin, March 1968, p. 4.

Family of four—criteria used by the Federal government as a measure of poverty

March 1967 \$3,335.00 July 1969 \$3,717.52**

IV. Department of Social Services, New York City.

under 5

Family of four, one adult, three children, projecting semimonthly grants and monthly rent of \$93 into annual income.

monthly grants and monthly rent of \$75 into annual income.		
Grants effective*** prior to July 1, 1969	Grant effective from July 1, 1969	
4180.) 4060.) 3940.) 3820.) 3652.)	3612.00	
	Grants effective*** prior to July 1, 1969 4180.) 4060.) 3940.) 3820.)	

^{*}Consumer Price Index (base 1957-59), New York, New York, used to estimate the increase in the cost.

3340.

^{**} Consumer Price Index (base 1957-59), U. S. City Average, used to estimate the increase in cost.

^{***} Includes cyclical grant of \$100 per person, per year for clothing and house furnishings.

AFDC grant (including rent of \$93 per month)	\$3,612.00
Social Security Administration Index (poverty level)	3,717.50
Bureau of Labor Statistics (New York-Northeastern New Jersey are lower standard, exclusive of taxes) Community Council of Greater New York	ea, 5,488.00
(Family Budget Standard, exclusive of taxes)	6,922.50

It is apparent that the AFDC grant specified by §131-a of the Social Services Law falls below what is generally thought to be a minimum acceptable standard of living. A more refined comparison confirms this contention. Using two typical AFDC families—a mother with three children under five, and a mother with three children of 6, 9, and 12—and using July 1969, New York City prices for the goods and services required by such families the following annual figures are obtained:

AFDC grant (including rent)	\$3,612.00
AFDC need (mother, three children of 5, 3, and 1)	4,840.70
AFDC need (mother, three children of 6, 9, and 12)	5,714.91

Families receiving AFDC are also dependent on other publicly-supported, though non-public assistance, programs such as day-care, health services, and supplementary food programs. There is general agreement that these programs do not provide adequately for AFDC families, or other poor persons for that matter.

According to a survey of the day care population by the Division of Day Care of the New York City Department of Social Services as of May 1969, only 22% of the families and 30% of the children who were receiving day care services were also receiving public assistance. The problem is further compounded by the shortage of facilities for both group day care and family day care.

Programs had been developed in which AFDC mothers were employed to care for several children of other AFDC mothers while the latter were working or being trained. This necessitated the presence of a telephone, and, as will be discussed below, p. 38, there are no funds now permitted welfare recipients for telephones.

Supplementary food programs, such as the Federal surplus food program, are similarly inadequate. The limited variety of foods available and the distances which recipients must travel to collect them present serious problems for such families. For example, before the enactment of §131-a of the Social Services Law, the most prudent course of action for a recipient was to obtain as large a quantity of surplus foods as possible at one time in order to conserve his meager carfare resources. Such a quantity, however, made the use of public mass transportation facilities quite difficult. The problem is currently compounded by the absence in the maximum grants under §131-a of any funds for carfare—even for public transportation.

The problem of health services for the poor is well known.

^{* * *} the poor are less able to afford health services and certainly receive less health care than do non-poor in

spite of a variety of programs (albeit piecemeal) for the financing and delivery of health services to the poor. Maldistribution of health care personnel and facilities and their inefficient organization in relation to health needs is in large part responsible for the problem. • • • Secondly, people from low-socio-economic environments have a significantly higher incidence of health problems than the general population. Subgroups of poor people tend to share similar attitudes and characteristics concerning health which set them apart from the rest of the population—consumer habits, geographic location, abilities to cope with the health institutions and procedures, and so on. 56

This description of a nationwide problem is particularly true in the City of New York, despite the fact that "New York City has historically devoted a larger percentage of its income to health services than has any other big city in our country." There has been, in the City of New York, little implementation of federal programs such as Comprehensive Health Care Planning, P.L. 89-749, and Regional Medical Programs—Heart, Cancer and Stroke, P.L. 89-239. The absence of funds for capital construction has had a retarding effect on the implementation of Federal maternity and child-care programs.

The reductions in AFDC grants, pursuant to §131-a, coupled with the inadequacies of supplementary programs have had a devastating impact on AFDC families. The files of amici and their affiliated agencies are replete with examples.

^{56.} United States Department of Health, Education and Welfare, Delivery of Health Services for the Poor at 1 (1967).

^{57.} Address by William Glazier, New York State Welfare Conference, November 1968.

- Parents unable to visit children in institutions out of New York City; parents unable to take themselves or their children to clinics or hospitals for needed treatment; mothers unable to visit the employment office every two weeks as required in many cases or to get to schools in which they are enrolled; there is no transportation allowance in the fixed grant under §131-a.
- Children unable to attend school because they don't have adequate clothing; the student nurse needing shoes and uniforms. Not only has the special grant for clothing, which had heretofore supplemented the recurring family need for children's clothing, been abolished, but the amount included for clothing in the present §131-a computation is grossly inadequate.
- Families having a decent low-rent apartment but no furniture, or having to use their old vermininfested furniture: there is no furniture or fumigation allowance in the fixed grant under §131-a.⁵⁸
- Mothers with jobs, but no funds for babysitters or for their own lunch; seriously ill persons with no funds for special diets or telephones to get prompt medical attention: there are no allowances for such items in the fixed grant under §131-a.

Many families known to amici and their affiliates try to find the funds within the fixed grant. The only conceivably flexible item is food—but how flexible is 66 cents per day per person? "Even a Food Expert Can Stretch a Welfare Budget Only So Far" was the headline of an article in the New York Times⁵⁰ by Craig Claiborne. The flexibility is

^{58.} This often results in families having to remain in hotel or other furnished accommodations at additional public expense, and provides them with no equity in any property.

^{59.} July 31, 1969, p. 30.

further limited by the poor being unable to buy in volume, resulting in their having to pay high prices for food. And if the food money is used for some of the other necessary items, malnutrition becomes a real possibility.

Conclusion

The State of New York, in enacting §131-a of the Social Services Law, did not comply with the requirements of 42 U.S.C. 602(a) (23) that States adjust the amounts used to determine the needs of individuals "to reflect fully changes in living costs since such amounts were established." The decision of the court below should be reversed.

Respectfully submitted,

KARL D. ZUKERMAN Community Service Society of New York

DOROTHY COYLE
The Catholic Charities of the
Archdiocese of New York

MILDRED SHANLEY
Catholic Charities, Diocese of Brooklyn

PHILIP SOKOL
Federation of Jewish Philanthropics
of New York

LOUIS AGIN
Federation of Protestant Welfare Agencies

Attorneys for Amici

SHIRLEY MITGANG
Of Counsel

Dated: October 27, 1969

^{60.} New York Times, June 12, 1966, §1, p. 56.



Supreme Court of the United States FILE

OCTOBER TERM, 1969

No. 540

NOV 6 19

JOHN F. DAVIS,

GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHEYN FOLK, ANNIE LOU PHILLIPS, and MAJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated, Plaintiffs.

-against-

OBGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Defendants.

RIEF OF NEW YORK CIVIL LIBERTIES UNION; BLOCK COMMUNITIES, INC.; CITIZENS COMMITTEE FOR CHILDREN; CITIZENS UNION; COALITION FOR ADEQUATE INCOME AND MEDICAID; INTER-SCHOOL COUNCIL OF THE METROPOLITAN NEW YORK SCHOOLS OF SOCIAL WORK; NATIONAL ASSOCIATION OF SOCIAL WORKERS, NEW YORK CITY CHAPTER; NATIONAL URBAN LEAGUE; NEW YORK ACTION CORPS; SOCIAL WORK ACTION FOR WELFARE; AND UNION SETTLEMENT ASSOCIATION; AMICI CURIAE

BURT NEUBORNE
ALAN H. LEVINE
PAUL G. CHEVIGNY
156 Fifth Avenue
New York, N.Y.

Attorneys for Amici Curiae

Of Counsel:

MELVIN L. WULF
ELEANOR HOLMES NORTON
MARTIN M. BERGER
JEROME KRETCHMER
FRANZ S. J. LEICHER
MANFRED OHRENSTEIN



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Supreme Court of the United States

Остовев Тевм, 1969

No. 540

Julia Rosado, Lydia Hernandez, Majorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Majorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Plaintiffs.

-against-

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Defendants.

BRIEF OF NEW YORK CIVIL LIBERTIES UNION; BLOCK COMMUNITIES, INC.; CITIZENS COMMITTEE FOR CHILDREN; CITIZENS UNION; COALITION FOR ADEQUATE INCOME AND MEDICAID; INTER-SCHOOL COUNCIL OF THE METROPOLITAN NEW YORK SCHOOLS OF SOCIAL WORK; NATIONAL ASSOCIATION OF SOCIAL WORKERS, NEW YORK CITY CHAPTER; NATIONAL URBAN LEAGUE; NEW YORK ACTION CORPS; SOCIAL WORK ACTION FOR WELFARE; AND UNION SETTLEMENT ASSOCIATION; AMICI CURIAE

Interest of Amici

The New York Civil Liberties Union, the New York State affiliate of the American Civil Liberties Union, and several additional organizations respectfully seek leave to file a brief amici curiae herein. Amici are organizations deeply involved in their daily professional endeavors with the plight of the poor in our society. Each is particularly concerned with the relationship of economic discrimination to human liberty and dignity. Each is particularly aware that the political constituency of the poverty stricken is non-existent and that only through victorous and humane judicial action can their legal rights be vindicated.

The process by which the legislature of the State of New York reduced AFDC payments to indigent children and their guardians bears ugly witness that all too often:

"right . . . is only in question for equals in power; the strong do what they can and the weak suffer what they must." ¹

It is the firm conviction of amici that Thucydides' view of society is not inevitable and that "Equal Justice Under Law" is a goal capable of attainment. It is in the belief that this case provides a major test of that conviction that this brief amici is respectfully submitted.

^{*} Consents to the filing of briefs amici herein have been secured from counsel provided typewritten versions were served by October 27, 1969. A typewritten version of this brief was served upon counsel for the parties on October 27, 1969.

¹ Thucydides, History of the Peloponnesian Wars, V, 84 ff. The phrase has also been translated:

[&]quot;Justice is attained only when both sides are equal. The powerful exact what they can and the weak yield what they must." Hamilton, The Greek Way, 181 (Time Inc. Ed. 1963).

ARGUMENT

Introduction

New York State receives approximately \$350,000,000 annually in AFDC funds from the Federal government. These AFDC funds, supplemented by State and local appropriations, are distributed by New York to "needy children and the parents or relatives with whom they are living." As with most "gifts", there are certain "strings" attached to the receipt of the Federal AFDC funds by the State of New York. E.g. Massachusetts v. Mellon, 262 U.S. 447 (1923). What those "strings" are, and who defines them, is what this case is all about. Appellants believe that the "strings" created by Section 402(a)(23) of the Social Security Act are substantial and that they are capable of definition by a Federal court. Appellees, on the other hand, reject the notion of meaningful "strings" and argue that if such statutory "strings" do exist, Federal courts lack power to define them.

I.

Federal Courts possess jurisdiction to determine whether State disbursement of AFDC funds comports with minimum federal statutory standards.

A majority of the Court of Appeals below held that a Federal District Court lacked power to determine whether the legislature of the State of New York had mandated the disbursement of Federally granted AFDC funds in violation of Federal statutory standards.

In essence, the decision below ruled that if any statutory "strings" do exist upon the state disbursement of Federally granted AFDC funds, they must be defined not by the unitary Federal court system, but rather by the fifty different court systems of the various states. It is most respectfully submitted that such a result is insupportable by either law or policy.

Wholly apart from the technical considerations of jurisdiction, it strains credulity to accept the fact that the State of New York may receive hundreds of millions of dollars in Federally granted AFDC funds each year and remain unaccountable to the putative recipients in a Federal judicial forum for the legality, under Federal law, of their disbursement. Where plaintiffs allege that Federal funds to which they assert a Federal statutory right are about to be disbursed by the State of New York in a manner inconsistent with that Federal statutory right, the issue literally cries out for resolution in a Federal judicial forum.

In addition to the obvious propriety of having claims arising under Federal statutes to Federal funds determined in a Federal forum, a practical consideration militates that such disputes be settled by the unitary Federal court system. Were challenges to the legality, under Federal statutory law, of the disbursement of Federally granted AFDC funds to be relegated to fifty different state forums, a plethora of differing interpretations would be virtually certain to result, throwing an already confused area of the law into utter chaos.

Finally, the very fact that the state does possess a great financial stake in the outcome of such cases militates against relegating their resolution exclusively to the state court system. It is no disservice to our state court systems to recognize that the ends of justice may be better served by providing an alternative neutral forum for the resolution of disputes to which the State is a party where a possibility exists that overriding state considerations may hinder the objective operation of the judicial process. It was precisely that recognition which impelled the creation of federal diversity jurisdiction over claims which pose no federal questions, but which, because of the respective citizenship of the parties, were susceptible of disposition on extralegal grounds in State courts. If it was wise to provide a neutral forum within which to resolve disputes between citizens of State A and citizens of State B, it is doubly prudent to provide that when a state is itself a defendant, charged with violating Federal law, in a case involving very large sums of money, the issue be resolved in a neutral forum.

Given the obvious desirability of Federal judicial resolution of this issue, do the Federal courts possess power to act?

Appellants have asserted three traditional bases of jurisdiction. First, they assert that Judge Weinstein exercised pendent jurisdiction flowing from the concededly valid convocation of a three judge District Court. Second, they contend that Judge Weinstein possessed classic federal question jurisdiction pursuant to 28 U.S.C. 1331. Finally, they assert that the District Court possessed "civil rights" jurisdiction pursuant to 42 U.S.C. §1983.

Amici agree that Judge Weinstein possessed pendent jurisdiction and "civil rights" jurisdiction pursuant to 42 U.S.C. §1983.

Amici believe, however, that it is unnecessary to search far afield for a jurisdictional nexus, because the District Court possessed classic Federal question jurisdiction pursuant to Title 28 U.S.C. 1331, which grants jurisdiction to District Courts over all civil actions arising under "the Constitution, laws, or treaties of the United States" provided that "the matter in controversy exceeds the sum or value of \$10,000."

Since appellants allege that the state statute in question violates a provision of the Federal Social Security Act, there is no doubt that their claim arises under the laws of the United States. A majority of the Court below ruled, however, that the "indirect damage" which would be sustained by the plaintiffs herein if their AFDC payments were unlawfully reduced below the subsistence level for an extended period of time was "too speculative" to satisfy the \$10,000 limitation upon 1331 jurisdiction.

The rigid construction of 1331 advanced by a majority of the Court below deprives poor persons of access to Federal courts in cases touching with awful and immediate impact their most precious "property" right. It is an unfortunate fact of life that no poverty stricken plaintiff can allege direct damages of \$10,000 when he complains that the state has failed to meet its Federal statutory obligations to him. Yet, the failure of the state to meet its Federal AFDC obligation is virtually certain to be among the most crucial occurrences in the life of a poor person.

To rule that a poverty stricken plaintiff is precluded from seeking Federal judicial protection of his most crucial Federal statutory right because that right is necessarily worth less than \$10,000 in direct value is to deny access to the Federal courts to poor persons solely because they are poor. Such a result runs counter to a generation of progress forged by this Court in removing the invidious "money hurdles" which stand between the poor and their right as Americans to equal access to the instrumentalities of justice.

If the \$10,000 jurisdiction limitation in Section 1331 forecloses the consideration of plaintiffs' claims herein, it is unconstitutional as a denial of equal protection of the laws, because it would stand as a pervasive restraint upon the ability of the poor to gain access to the Federal courts to vindicate their most precious federal property rights. See, Boyd v. Clark, 287 F. Supp. 561 (S.D.N.Y. 1968), Edelstein, J. dissenting at 567-569; Murray v. Vaughn, 300 F. Supp. 688 (D.R.I. 1969) at 695-697.

This Court has repeatedly declared that the existence of procedures which invidiously discriminate against the poor by creating money hurdles which they must overcome in order to gain access to their birthright as Americans violates the equal protection clause of the Fourteenth Amendment.

In Edwards v. California, 314 U.S. 160 (1941), this Court struck down a statute making it a crime to introduce an indigent into the State of California. Mr. Justice Douglas, in his concurring opinion, stated that the existence of such a financial test upon the right of the poor to travel freely:

"... would ... introduce a caste system utterly incompatible with the spirit of our system of government.

It would permit those who were stigmatized by a State

^{*} Griffin v. Illinois, 351 U.S. 12 (1956), Frankfurter, J. concurring at 23.

as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. 314 U.S. at 181.

Mr. Justice Jackson, in his concurring opinion in Edwards, added:

"We should say now, and in, no uncertain terms, that a man's mere property status, without more, cannot be used by a State to test, qualify, or limit his rights as a citizen of the United States." 314 U.S. at 184.

If a poor person is precluded from litigating the central issue in his life in Federal court because such a right is inevitably worth less than \$10,000, have we not used his "property status" as a means to "test, qualify, or limit his rights as a citizen of the United States"?

In Griffin v. Illinois, 351 U.S. 12 (1956), this Court struck down a procedure whereby indigent defendants were prevented from appealing from criminal convictions by being denied free transcripts of their trials. Mr. Justice Black, writing for the Court, stated:

"Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal.

Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to plead not guilty or to defend themselves in court. 351 U.S. at 16-17.

Mr. Justice Frankfurter, concurring in Griffin, added:

"... when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons . . . from securing such review . . .

To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law . . .

The State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity." 351 U.S. at 23-24.

Do we really provide equal justice for the poor and rich when by means of an artifically rigid construction of Section 1331, we permit "lack of means" to preclude an impoverished plaintiff from protecting his most valuable "property" right from State encroachment?

In Burns v. Ohio, 360 U.S. 252 (1959), this Court struck down a procedure which precluded an indigent defendant from perfecting his appeal until he paid a \$20 filing fee. Chief Justice Warren, writing for the Court, stated:

"The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." 360 U.S. at 258.

In Smith v. Bennett, 365 U.S. 708 (1961), this Court invalidated a \$4 filing fee required prior to filing a writ of habeas corpus.

In Douglas v. California, 372 U.S. 353 (1963), this Court invalidated a procedure whereby appellate counsel for indigent prisoners was provided only for "meritorious" appeals.

In Gideon v. Wainwright, 372 U.S. 355 (1963), this Court reversed prior contrary precedents and ruled that an indigent defendant in a non-capital felony case was constitutionally entitled to a court appointed counsel. See also, Harper v. Virginia Board of Electors, 383 U.S. 663 (1966); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963).

Finally, in Roberts v. La Vallee, 389 U.S. 40 (1967), this Court, in condemning per curiam, New York's refusal to provide an indigent defendant with a copy of his preliminary hearing, summed up the present state of the constitutional right to equal access to the courts:

"Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." 389 U.S. at 42.

Viewed against the perspective of a decade of decisions in which this Court has consistently attempted to provide the poor with equal access to justice, the rigid interpretation of Section 1331 advanced by the Court below is a major retreat. Surely the search for equal justice under law cannot stop at the criminal courthouse door.

In Sniadach v. Family Finance Corporation, — U.S. —, 23 L.Ed.2d 349 (1969), this Court invalidated Wisconsin's pre-judgment wage garnishment provisions in

large part because their effect was to deprive poor debtors of their day in court.

In Williams v. Shaffer, 385 U.S. 1037 (1967), this Court was asked to review the constitutionality of a court procedure which required an evicted tenant to post a bond for costs prior to contesting an eviction. Six justices declined to grant certiorari. However, two years later in Simmons v. Housing Authority of West Haven, No. 909 (April 7, 1969), this Court granted certiorari on the identical issue. In dissenting from the denial of certiorari in Williams v. Shaffer, supra, Mr. Justice Douglas stated, in words particularly appropriate to this case:

"We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judicial relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters." 385 U.S. at 1039.

It is respectfully submitted that the rigid interpretation of Section 1331 advanced by the Court below necessarily renders the ability to obtain judicial relief in the Federal courts almost entirely dependent upon the length of one's purse. It, therefore, renders the \$10,000 jurisdictional amount constitutionally vulnerable.

But, as Judge Weinstein pointed out in the District Court, the wooden reading given to the jurisdictional

^{*} Chief Justice Warren concurred in Mr. Justice Douglas' opinion and Mr. Justice Brennan was also of the opinion that certiorari should be granted.

amount by the Court below is not the only way to read Section 1331. Judge Weinstein, after conceding that no plaintiff alleged a direct loss of \$10,000, considered the issue of whether the potential indirect damage to the plaintiffs was of sufficient magnitude to satisfy the \$10,000 iimitation. He concluded that the physical deprivation and psychological trauma inherent in being unlawfully forced to live below the subsistence level for an extended period of time was an "indirect damage" sufficient to satisfy the \$10,000 criteria.

Judge Hays and Chief Judge Lumbard rejected the use of indirect damages below as "too speculative", without in any way grappling with the stark fact that such indirect damage is absolutely certain to occur if plaintiffs are forced to remain below the subsistence level for an extended period of time. It requires no Anatole France to recognize the extraordinary insensitivity inherent in such a position.*

The requirement that a poor person establish that his direct claim against the state for AFDC payments exceeds \$10,000 stands as a formidable "money hurdle" between the poor and the judicial vindication of their most crucial Federal property rights. It likewise requires no Anatole France to recognize that the invidious discrimination against the poor inherent in such a rule can no longer be tolerated in an American society which pays more than lip service to equal protection of the laws.

[&]quot;...the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." John Cournos, A Modern Plutarch, p. 27.

П.

The decrease in AFDC payments mandated by Section 131(a) of New York's Social Service Law violates Section 402(a) (23) of the Social Security Act.

A. Section 402(a)(23) requires an upward revision in the dollar amounts actually paid out to AFDC recipients to reflect increases in the cost of living through July 1, 1969.

Both Judge Weinstein in the District Court and Judge Feinberg, dissenting below, ruled that Section 402(a)(23) forbade decreases in the dollar amount of AFDC benefits in the face of the steadily rising cost of living. In so finding, they agreed with the only Federal judge to have previously considered the issue. Lampton v. Bonin, — F. Supp. — (E.D. La. 1969) (Cassibry, J.)). Their reading of the statute was subsequently followed by a unanimous three judge court in Texas. Jefferson v. Hackney, Civil Nos. 3-3012-B, 3-3126-B (N.D. Texas, July 1, 1969). See also, Williams v. Dandridge, 297 F.Supp. 450 (D.Md. 1968), (probable jurisdiction noted).

Amici are in full accord with the construction of Section 402(a)(23) enunciated by Judges Weinstein and Feinberg. The attempt by appellees to construe the statute into an exercise in meaningless futility must be rejected.

B. Section 131(a) of New York's Social Service Law violates even the most restrictive construction of Section 402(a)(23) of the Social Security Act.

Section 402(a)(23) of the Social Security Act requires that each participating state's AFDC plan must:

"provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have

been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." Pub. L. 90-248, Title 2, §202(6); 81 Stat. 821 (eff. January 2, 1968).

The restrictive interpretation of Section 402(a)(23) advanced by Judge Hays below, and, apparently, by the Department of Health, Education and Welfare, construes the phrase "amounts used by the State to determine the needs of individuals" to refer solely to the abstract and theoretical "standard of need" which each state is required to prepare to reflect the items necessary for a subsistence existence within that state. 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). Thus, even the restrictive interpretation concedes that at the very least 402(a)(23) requires a realistic reassessment of the real cost of a subsistence existence in each state as of July 1, 1969. This reassessment must then be reflected in a new "standard of need", reflecting the inflationary spiral which has generated systematic rises in the cost of the necessities of life over the past several years.

However, the restrictive interpretation continues, once a realistic theoretical model of the local "standard of need" [or, more accurately, standard of subsistence] has been arrived at, a state is free to elect to have its actual dollar AFDC payments to recipients remain unchanged, or even elect, as has New York, to have such dollar payments decreased, by announcing that the percentage of the standard of subsistence met by the AFDC payments shall be decreased.

Thus, according to the restrictive interpretation, if State A's standard of need had been \$100 per month prior to the passage of Section 402(a)(23), and if the State had been paying 100 per cent of this standard of need, it would be required to undertake a realistic reassessment of the cost of a subsistence existence as of July 1, 1969, and update its "standard of need" to reflect the rise in the cost of living. However, once that reassessment and updating of its "standard of need" had been completed, the restrictive interpretation would permit State A to anchor its actual dollar AFDC payments to the pre July 1, 1969 levels by simply announcing that henceforth, instead of paying 100 per cent of need, State A would pay a lower proportionate amount. Indeed, by this device of percentage decrease, State A would be permitted, under the restrictive interpretation, to actually decrease its payments below July 1, 1969 dollar amounts, while simultaneously conceding that the cost of subsistence existence in State A had drastically increased.

As Judges Weinstein and Feinberg have noted, such a restrictive interpretation would drastically minimize the statute's impact.

New York State has seized upon this restrictive interpretation in an effort to justify the legality of its decrease in the dollar amounts of AFDC grants in the face of conceded rises in the cost of living in New York State.

However, even conceding for the sake of argument the validity of the "restrictive interpretation" of 402(a)(23), New York's actions violate even that minimal statutory prohibition.

New York, by means of Section 131(a) has arbitrarily reassessed its "standard of need" to revise it downward in the face of a spiraling cost of living. Thus, New York has violated the first command of even the most restrictive view of Section 402(a)(23) which requires a state wishing to receive Federal AFDC funds to postulate a realistic model of the cost of a subsistence existence in that state after taking rising price levels into consideration.

Having arrived at an unrealistically emasculated "standard of subsistence," New York, which had purported to pay 100 per cent of its "standard of subsistence" for over thirty years, promptly reduced the dollar amounts actually paid out to AFDC recipients to reflect the decreases in its now fictitious "standard of subsistence". Since its "standard of need" had been, astonishingly, revised downward in the face of Section 402(a)(23), New York, respite the decreases in the dollar amounts actually paid out to AFDC recipients, piously continued to assert that it was one of the twentynine states paying 100 per cent of subsistence need.

Thus, New York State sought to evade even the most restrictive interpretation of 402(a)(23) by refusing to acknowledge publicly that it no longer pays 100 per cent of the cost of subsistence existence. This requirement of clear statement is the absolute minimum which 402(a)(23) can be construed to create, without reducing the statute to an exercise in meaningless futility.

Under the restrictive interpretation of 402(a)(23) therefore, if New York wished to reduce its level of payments to AFDC recipients to below the subsistence level, it was obliged to be frank and open in doing so.

First, it was required to posit a realistic model of the cost of subsistence living in New York.

Second, it was required to announce publicly that by decreasing the dollar amounts actually paid to recipients, New York no longer was paying 100 per cent of the standard of subsistence living to its indigent children.

In New York State, such an admission would constitute a radical break with thirty years of social tradition and would raise political and moral issues of the highest magnitude.

By resorting to the shabby subterfuge of cynically reducing, in the face of major rises in the cost of living, its estimate of the cost of subsistence living, the New York Legislature was able to decrease the dollar amounts actually paid to AFDC recipients without admitting to the citizens of the State that New York no longer pays 100 per cent of any realistic standard of need. The voters of the State were thus misled into believing that New York continued to fulfill its traditional responsibility of meeting 100 per cent of the subsistence needs of its indigent children. The only persons in the State of New York who were made aware by the Legislature that New York was no longer paying 100 per cent of the subsistence cost of living were the AFDC recipients themselves—and they learned the hard way, through privation and despair.

In addition to hoodwinking the voters of the State, New York's procedure is less than candid with the responsible officials of the Federal government, since New York continues to represent to them that it pays 100 per cent of the subsistence cost of living of its AFDC recipients.

In summary, therefore, the "restrictive interpretation" of 402(a)(23) provides the following minimal "strings" on the receipt of Federal AFDC funds by a state:

- (a) no dollar limitations or minimums are placed upon the amounts actually payable by the participating states to local AFDC recipients;
- (b) each participating state is required to establish a standard of need based upon a realistic assessment of the cost of subsistence living within that state as of July 1, 1969.
- (c) if a participating state elects to pay less than 100 per cent of the cost of subsistence living within that state, it must candidly admit that fact in unmistakable terms so that the voters of the state and the responsible Federal officials may have an opportunity to react.

New York's procedure is nothing less than a grotesque parody of the minimal obligations required of participating AFDC states by even the most restrictive view of 402 (a)(23). Rather than following the statutory command of candor, full disclosure and informed choice, it resorts to subterfuge, evasion and ignorance. If New York wishes to abandon its proud tradition of meeting 100 per cent of the cost of subsistence living of its indigent children, Section 402(a)(23), if it means nothing else, requires that New Yorkers take that step openly, with full knowledge of the moral implications of their acts.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals should be reversed and the determination of the District Court should be reinstated.

Respectfully submitted,

BUBT NEUBORNE
ALAN H. LEVINE
PAUL G. CHEVIGNY

Attorneys for Amici Curiae

Of Counsel:

MELVIN L. WULF ELEANOB HOLMES NOBTON MARTIN M. BERGER JEROME KRETCHMER FRANZ S. J. LEICHER MANFRED OHRENSTEIN

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Supreme Court of the United States DAVIS, CLERK

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MARJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHILLIPS, and MARJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners.

-against-

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK.

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

LEE A. ALBERT Center on Social Welfare Policy and Law 401 West 117 Street New York, New York 10027 280-4112

> HAROLD EDGAR HENRY A. FREEDMAN STEVEN J. COLE SYLVIA ANN LAW NANCY DUFF LEVY Of Counsel

CARL RACHLIN

General Counsel,

National Welfare Rights

Organization

180 Park Row

New York, New York

Martin Garbus

Roger Baldwin Foundation

of the American Civil

Liberties Union

156 Fifth Avenue

New York, New York 10012

DAVID GILMAN
General Counsel,
City-Wide Coordinating
Committee of Welfare
Groups
c/o MFY Legal Services,
Inc.
759 10th Avenue
New York, New York

CESAR PERALES
Williamsburg Legal Services
260 Broadway
Brooklyn, New York 11211

VIRGINIA SCHULER

Brownsville Legal Services
424 Stone Avenue

Brooklyn, New York

HAPPIN J. ROTHWAY

HAROLD J. ROTHWAX
ERIC HIRSCHHORN
MFY Legal Services, Inc.
320 East Third Street
New York, New York

MORT COHEN

South Brooklyn Legal

Services

152 Court Street

Brooklyn, New York 11201





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

Julia Rosado, Lydia Hernandez, Marjorie Miley, Sophia Abrom, Ruby Gathers, Louise Lowman, Eula Mae King, Cathryn Folk, Annie Lou Phillips, and Marjorie Duffy, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

Petitioners,

-against-

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the three-judge District Court dismissing the constitutional claim, dissolving itself, and remanding the case to the single judge is set forth in the joint appendix at 133.1

¹ Citations to the joint appendix will appear as (). Citations to the appendix to this brief will appear as (A).

The revised opinions of the one-judge District Court granting the preliminary injunction, summary judgment and the permanent injunction are set forth at 167. The District Court opinions have not been reported to date.

The opinion of the Court of Appeals affirming the dissolution of the three-judge court, vacating both injunctions, and reversing summary judgment is set forth at 215, and is reported at 414 F. 2d 120.

Jurisdiction

The judgment of the Second Circuit Court of Appeals affirming the dissolution of the three-judge court, vacating the preliminary and permanent injunctions and reversing the summary judgment was entered on July 16, 1969 (259). The petition for certiorari was filed on August 30, 1969 and certiorari, along with a motion to advance, was granted on October 13, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

Title 42, United States Code, Section 602(a)(23) provides:

Sec. 602(a) A State plan for aid and services to needy families with children must

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

45 C.F.R. §233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969) provides:

In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standard.

45 C.F.R. §233.20(a)(3)(viii), 34 Fed. Reg. 1394 (1969) provides:

... that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.

Ch. 184, L. 1969 (March 31, 1969) of the State of New York provides in pertinent part: Section 1. Legislative findings and purpose. The spiraling rise of public assistance rolls and the expenditures therefor, despite a high level of general prosperity and an unprecedented high rate of employment, have become matters of primary social and economic concern to the people of the state of New York. The escalation continues, both in numbers of people requesting assistance and in the costs thereof, despite predicted continuance of general prosperity and high employment.

The legislature therefore finds and declares that it is necessary and in the best interests of the people of the state to establish a schedule of maximum monthly grants and allowances of public assistance for the city of New York social services district and a schedule of maximum monthly grants and allowances of public assistance for all other local social services districts in the state, based upon the costs of delivering the needs of public assistance recipients in the respective social services districts of the state, and to make other remedial changes provided for in this chapter.

§5. Such law is hereby amended by adding a new section, to be section one hundred thirty-one-a, to read as follows:

§131-a. Maximum monthly grants and allowances of public assistance. 1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members

of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number	of Persons in	Household

One	Two	Three	Four	Five	Six	Seven
\$70	\$116	\$162	\$208	\$254	\$297	\$340

For each additional eligible needy person in the household there shall be an additional allowance of fortythree dollars.monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number o	f Persons	in Household
At white of	1 Toloune	ALL MACHORING

One	Two	Three	Four	Five	Six	Seven
\$60	\$101	\$142	\$183	\$224	\$257	\$290

For each additional eligible needy person in the household there shall be an additional allowance of thirtythree dollars monthly.

- 4. Any such social services district shall be permitted, with the approval of the commissioner, to adopt a schedule of monthly grants and allowances for lesser amounts than established by the regulations of the department, subject to the above limitations, for all items of need, exclusive of shelter and fuel for heating, if on application to the department made by the social services official thereof with the approval of the appropriate local legislative body, such district establishes to the commissioner that in such district the total cost of the items required to be provided and reflected in the schedule, actually is less than the schedule of monthly grants and allowances established by the regulations of the department.
- 5. In order that the legislature may, from time to time, consider adjustments to reflect changes in the cost of living, the board and the department shall annually make an appropriate report to the governor and the legislature, which report shall include the recommendations of the board and the department relating thereto.
- 6. Notwithstanding any other provisions of this chapter or other law, a social services official may make provision for the replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe, provided provision therefor cannot otherwise be made.

Ch. 411, L. 1969 (May 9, 1969) of the State of New York provides:

- Section 1. Subdivision four of section one hundred thirty-one-a of the social services law, as added by chapter one hundred eighty-four of the laws of nineteen hundred sixty-nine, is hereby repealed, and a new subdivision four is hereby inserted in lieu thereof, to read as follows:
- 4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision.

Title 42, United States Code, Section 1983 provides:

Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . [in a] suit in equity, or other proper proceeding for redress.

Title 28, United States Code, Section 1343 provides:

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (3) To redress the deprivation, under color of any State . . . statute . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
- (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28, United States Code, Section 1331 provides:

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 2281, provides:

Injunction against enforcement of State statute; threejudge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute... shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 28, United States Code, Section 2284, provides:

Three-judge district court; composition; procedure

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Questions Presented

In January, 1968 Congress mandated that states maintain their efforts in AFDC in light of inflation through a cost of living adjustment of the amounts used to determine the needs of individuals and any maximums imposed on the amount of aid paid. In March, 1969, New York reformulated its standard of need in order to reduce its efforts in AFDC in 1969-1970. Petitioners, critically affected by this welfare cutback, sued in a United States District Court to adjudicate the validity under the Constitution and the Social Security Act of this reduction of effort. The questions before this Court are whether:

- 1. Section 402(a)(23) of the Social Security Act forbids New York from eliminating or reducing the amounts used to determine the needs of individuals in order to curtail its efforts in AFDC?
- 2. A United States District Court is without jurisdiction, pendent or independent, timely to adjudicate this question of validity under paramount federal law.

Statement of the Case

New York, along with the 49 other states,² participates in the federal Aid to Families with Dependent Children program (AFDC), established in 1935 as a long range inter-governmental endeavor to provide for the economic security and well-being of needy children deprived of parental support by virtue of the death, incapacity or ab-

² The District of Columbia, Puerto Rico, Guam and the Virgin Islands also participate in the AFDC program.

sence of a parent. Social Security Act of 1935, §§401 et seq., 42 U.S.C. §§601 et seq. It is a residual assistance program, meeting such basic needs as shelter, food, clothing, educational necessities and home furnishings, when all other resources and income, including the benefits of other programs, have been exhausted. 42 U.S.C. §602(a)(7). Under this scheme of cooperative federalism, the federal government now bears the major share of financial responsibility under an open-ended appropriation in exchange for state administration in conformity with the federal statutory commands essential for attainment of national program objectives. Section 402(a)(1)-(23), 42 U.S.C. §602 (a)(1)-(23).

These fundamental program objectives long have recognized and accepted the wide variations among the several states in wealth, living costs, social and economic conditions; the most recent of the federal statutory conditions continues this tradition. Relying upon each state's own standard of need and levels of payment then in effect, it provides:

"A State plan . . . must

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." 42 U.S.C. 602(a)(23) (§402(a)(23) of the Social Security Act of 1935, as amended).

This case puts in issue whether the State of New York, along with other states, must comply with this federal mandate.

Central to the AFDC program in all states is the standard of need (i.e., the minimal amounts for food, clothing and other necessities) used to determine the amount of aid to be provided "needy" families with dependent children. Prior to the legislative welfare cuts of 1969, New York's AFDC standard of need and level of benefits were administratively determined "in accordance with standards of public health in the community with due regard for variations in costs from time to time and between localities," New York Social Services Law §131(3). The standard was state-wide, with small difference for minor variations in utility costs. It included as part of the recurring grant for all recipients monetary amounts for food, utilities, household supplies, and personal incidentals, which varied with the size of family and the age of the oldest child;3 New York's standard also included as critical supplements to the semimonthly grant monetary amounts for major items of clothing and home furnishings, medically-dictated diets and telephones, transportation, educational necessities,

³ 18 N.Y.C.R.R. §352.4, repealed as of July 1, 1969, and replaced by a new section. (The same history applies to the other repealed regulations cited herein.)

^{* 18} N.Y.C.R.R. §352.4(c), repealed.

⁵ 18 N.Y.C.R.R. §352.5(j), repealed.

^{*18} N.Y.C.R.R. §352.4(b)(7), (8), (9), repealed.

⁷ 18 N.Y.C.R.R. §352.5(i), repealed.

^{* 18} N.Y.C.R.R. §352.5(p), repealed.

^{* 18} N.Y.C.R.R. §352.5(d), repealed.

the latter being paid at cost within allowable limits. Often representing a substantial portion of the amount of aid furnished, these supplements were furnished on a specific occasion of need or recurringly in accordance with individual and family requirements, save for a flat quarterly grant in New York City of \$25 per family member for clothing and home furnishings. All of these amounts comprised the state-wide standard of need for which 50 cent federal matching funds was afforded under New York AFDC plan. The standard was repriced and adjusted annually pursuant to an administrative study of living costs in May of each year.

In lieu of the 1969 adjustment for the inflationary spiral since May, 1968, the New York Legislature in March, 1969, abolished the administrative need standard and established two statutory schedules "of maximum monthly grants and allowances," applicable respectively to New York City and the rest of the State. Based upon "the spiraling rise of public assistance rolls and the expenditures therefor," a new standard of need was formulated to accommodate a 13

^{10 18} N.Y.C.R.R. §352.5(d).

^{11 18} N.Y.C.R.R. §352.4(c) (iv), repealed.

^{13 18} N.Y.C.R.R. §352.4(e), repealed.

¹⁸ New York obtained a waiver from H.E.W. under 42 U.S.C. §1315 of the Federal requirements of state-wide uniformity.

¹⁴42 U.S.C. §1318; H.E.W. Handbook of Public Assistance Administration, Pt. V, §2233 (hereafter cited as H.E.W. Handbook). New York State and New York City share the remaining costs equally. N.Y. Soc. Serv. Law §153(i)(d).

¹⁵ See N.Y. Soc. Serv. Law §131(3); 18 N.Y.C.R.R. §352.1(a), repealed.

¹⁶ L. 1969, Ch. 184, §1 (March 31, 1969).

percent cut in New York's AFDC annual budget for projected expenditures based upon the then prevailing standard of need. The correspondingly reduced 25 percent local and 50 percent federal matching shares, heavily relied on in the State budget, reduced New York's overall effort in AFDC by approximately 75 million dollars for fiscal year 1970 (212). This severe retreat is accomplished by contraction and reduction of the standard of need which, it is decreed, "shall be deemed to make adequate provision for all items of need . . . exclusive of shelter and fuel for heating. . . . " New York Social Services Law §131-a(1). Excluded entirely from the revised standard are the differential amounts for the greater nutritional, social and educational needs of older children, particularly teenage children, and, with the exception of rent and fuel, all of the amounts long afforded as supplements to the regular grant, including the flat \$25 quarterly per person allowance in New York City. As the Governor summarized the new standard.

"My proposals for limiting public assistance and care payments . . . will include elimination of the non-recurring special need grants [and] reduction of public assistance eligibility standards" [Executive Budget for Fiscal Year April 1, 1969 to March 31, 1970 at m 14, Doc. No. 48.]

The techniques used produced even greater reductions for the other urban counties outside New York City, including those long grouped with the City as having identical living costs. The newly established five to ten dollar monthly differentials per person were no longer attributable to minor variations in utility cost, but, the Respondent averred, to the sheer numbers of AFDC families in New York City and the stress of city life (99-100).

The revised standard was signed into law on March 31, 1969, as Section 131-a, New York Social Services Law, and thereupon became a part of New York's federal AFDC plan, under which federal monies are advanced quarterly. The Legislature adjourned soon thereafter until the next regular session in 1970 and the new schedules were to be unconditionally and promptly implemented by the state administrator so as to be fully operative throughout the state by July 1, 1969.

Pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4), and 28 U.S.C. §1331, this lawsuit was instituted by families dependent on AFDC for the rudiments of life to adjudicate under federal law in a federal district court the validity vel non of the reduced statutory schedules and to enjoin the Respondent state administrator from implementing them throughout the state. The gravamen of the complaint was that the amounts now used "to determine the needs of individuals" and levels of payments in New York's AFDC plan do not reflect changes in living costs and thereby offend Section 602(a)(23); and, that the further reduced standard for recipients residing in the metropolitan urban counties outside New York City, with at least comparable living costs, violate the constitutional guarantee of equal protection of the laws and the Social Security Act guarantee of uniformity in standards of need and levels of payments within a state. 42 U.S.C. §602(a)(1); 45 C.F.R. \$233.20(a)(2)(iii), (viii); 34 Fed. Reg. 1394 (1969).

Initially "all parties agree[d] that time is of the essence" (75) and New York quickly moved to convene a three-judge

court (26). The United States and the Department of Health, Education and Welfare (H.E.W.), immediately notified of the case by telegrams (27, 28), declined District Judge Weinstein's invitation to intervene or to file an amicus brief17 and vigorously opposed New York's motion to join H.E.W. as a party defendant (29, 35). The motion was denied since plaintiffs "do not seek to cut off federal funds" (34) and since H.E.W.'s interest and position can be "made known to the Court, by the filing of an amicus brief" (35). H.E.W. along with the City of New York and Nassau County, did become parties amici curiae in the District Court, and interposed no opposition to the course of proceedings in that Court. The views of the federal agency, as expressed in a recent regulation under 402(a)(23) and a brief explicating at length the statute and regulation. were before the District Court.18 A three-judge court was convened as "the appropriate vehicle for speedily resolving all the issues in this case so that uncertainty may be eliminated as soon as possible" (75).

Testimony of state and city welfare officials, along with numerous affidavits of medical and social work experts, public and private, at initial hearings established that

¹⁷ H.E.W. agreed to answer specific questions if necessary (30).

¹⁸ In two other decided cases in which the interpretation of §402(a)(23) was at issue, H.E.W. submitted unicus briefs supporting the State. Lampton v. Bonin, — F. Supp. —, Civ. No. 68-2092-E (E.D. La. July 15, 1969); Jefferson v. Hackney, — F. Supp. —, Civ. No. CA-3-3012-B (N.D. Tex. 1969). In Lampton a divided court (2-1) upheld H.E.W.'s position that Louisiana complied with §402(a)(23), while a unanimous court in Jefferson held that Texas' cutbacks were not in compliance. Both cases are now being appealed to this Court. The H.E.W. brief in Lampton was before the District Court in this case. Both briefs are set out in the appendix to this brief. They will be hereafter cited as H.E.W. Lampton (or Jefferson) Brief A-.

AFDC grants in New York before the reduction barely allowed for life at subsistence level compatible with health and decency (38, 56);10 that high infant mortality, malnutrition, stunted growth and educational performance were then common place among AFDC families in New York;20 and that the widespread reductions in current payments therefore seriously threatened physical and mental wellbeing and development and family life.21 The evidence also showed that the plaintiff families would suffer reductions ranging from 3% to 38% (184) and would be denied entirely critical allowances for transportation, diets, telephones necessitated by tuberculosis and other physical afflictions.22 It was further revealed that steps toward implementation, then underway, would take at least six to eight weeks and might at some unspecified point be irreversible (278, 279, Tr. 146, 147). A provisional order restraining such irreversible steps was entered (78).

Both parties on April 28, 1969 filed cross-motions for summary judgment on the equal protection and federal statutory claim (86, 120), supported by extensive exhibits, affidavits, official documents, testimony and briefing bearing upon the character and impact of the proposed reduction and the spiraling rise and similarities in living costs between New York City and its surrounding counties.

¹⁹ References to testimony before the District Court are cited as Tr. . The appendix references cited above appear in Doc. No. 61 at Tr. 74 and Tr. 108. See also Affidavit of Joseph Barbaro in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 34.

²⁰ Affidavit of Irene Blickstein in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 13.

²¹ Affidavit of Dr. Lewis Fraad in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 13.

²³ Affidavit of Marjorie Miley in Support of Plaintiffs' Motion for Summary Judgment, Doc. No. 3.

Although New York vigorously denied any reduction in its need standard, it maintained that continuation of the administrative standards of need might cost a total of 10 million dollars more in benefits each month (66, Tr. 125; 284, Tr. 157-158). The case was submitted, after argument, to the three-judge District Court on May 2.

Section 131-a was amended on May 9 to authorize the Respondent Administrator, if "it accords with federal requirements," to increase or decrease at any time the statutory allowances for any county outside New York City upon finding that the total costs of the budgeted items in the statutory need standard was more or less than the costs relied on by the Legislature. New York Social Services Law §131-a(4). Although without limit on decreases, no increase could be higher, regardless of costs, than the reduced New York City standard. Thereupon, on May 12, the three-judge court, ruled per curiam that although it had been properly convened, the substantial constitutional attack on the legislative schedules was now moot or unripe in light of the Respondent's discretionary power to raise or lower the schedules for the counties outside New York City. It ruled that "there is no reason for continuing the three-judge court" and remanded the federal statutory claim to the initial district judge "for such further proceedings as are appropriate" (135, 136).

Upon remand, the district judge, without further hearing or submissions, on May 15 entered a substantially dispositive 64-page opinion construing in considerable detail the controlling federal statute and setting forth the manner in which New York's reduced standard of need in section 131-a offends the statute (167). Summary judgment motions were continued to allow the parties to establish more pre-

cisely the magnitude of the welfare cutback and the temporary restraining order was transformed into a preliminary injunction to allow New York to pursue an interlocatory appeal (138). The appeal was expedited on May 21. 1969 and heard before a specially designated panel, Chief Judge Lumbard, Judges Hays and Feinberg,23 on June 4, at which time the Circuit Court denied Respondent's renewed request for a stay, stating that a final decision would be rendered promptly. On June 11, the Court of Appeals sua sponte granted a stay, Judge Feinberg dissenting (219), and on June 16, denied Petitioners' motion to vacate the stay or to enter a final order to facilitate an expedited application for review or relief in this Court. Judge Feinberg again dissenting. Concurrently, the Circuit Court also denied Respondent's motion to stay summary judgment proceedings in the District Court and Respondent provided that court with the clarifying information previously requested. On June 18, again without need for further hearing or argument, District Judge Weinstein issued a summary judgment (208) and permanent injunction (214), finding that there was no genuine issue of material fact, since the data submitted by the parties "is consistent so far as it is legally relevant" (208). This data revealed that New York's asserted "change to the flat grant system . . . has been used as a subterfuge to enact drastic cuts in both standards of need and levels of payment to meet the exigen-

²² Circuit Judge Moore, the presiding judge on the three-judge district court panel, was designated to sit on the Appellate panel along with Chief Judge Lumbard and Judge Feinberg, two of the judges who heard the initial application for a stay and expedition. To avoid further complexities and assure a validly constituted panel, Petitioners reluctantly brought 28 U.S.C. §47 to the attention of the Circuit Judges. Thereupon Chief Judge Lumbard designated Judge Hays to sit.

cies of a state budget . . . " (208, 209). Specifically the court found that "The decreases under section 131-a are greater in all respects . . . " (209). On the state's own figures, which omit consideration of the critical supplements to the grant, "141,313 families will receive decreases: the total monthly amount of these decreases is \$3,420,441 and the average monthly decrease is \$24.20" (209). Where the eliminated supplements for New York City are included (where 80 percent of AFDC families in the state reside). "the number of families suffering decreases rises to approximately 173,900 and the aggregate dollar amounts of their decreases totals approximately \$5,950,000 per month" (210). Conversely, 245 families (those with six or seven children, the oldest of whom is five years of age) receive an increase of a monthly aggregate of \$530 (210). Comparable data was not available for upstate. Using a liberal estimate of 30 percent as the State's share in AFDC, Judge Weinstein found that "the decrease [for 1969-1970] in total AFDC payments under the New York State program is no less than \$75,000,000" (212).

On June 24, this Court declined to intervene before judgment in the Court of Appeals, and dismissed the three-judge court appeal for want of jurisdiction. Rosado v. Wyman, — U.S. —, 89 S. Ct. 2134 (1969). All appeals were consolidated in the Second Circuit, which on July 16, without further briefing or argument on the summary judgment, issued its opinions, three in all. Chief Judge Lumbard (231) and Judge Hays (216) separately found, for a variety of alternative reasons, that the federal District Court was without jurisdiction or abused its discretion in the exercise of jurisdiction in ruling on whether New York had breached its federally-imposed obligation. Judge Hays ruled that

the District Court on remand was without power to decide the Social Security Act claim, since it "was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power" (221, 222). Chief Judge Lumbard, while disagreeing on power, found that the single-judge District Court abused its discretion in exercising jurisdiction, since "the extreme nature of the injunctive remedy against the state weighs heavily against the adjudication of a pendent claim by a single district judge," and since "the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts" (233). Judge Hays subscribed to these factors also. "[N]ot rest[ing] solely on jurisdictional grounds" (227), Judge Hays proceeded to find that the federal statute did not prohibit a reduction of payments in New York (228). Chief Judge Lumbard, without explication of the federal statute, added "that [dissenting] Judge Feinberg's view of the merits does not persuade me" (235). The preliminary and permanent injunctions were vacated, summary judgment reversed, and the three-judge court rulings affirmed as appropriate exercises of discretion. Judge Feinberg in a lengthy dissent would have affirmed the District Court on both jurisdictional grounds and on the merits (235).

Summary of Argument

T.

Petitioners' major premise is that New York must comply with paramount federal law in welfare matters as in all others. The claim before this Court invokes the AFDC Title of the Social Security Act, pursuant to which Congress has made huge sums available to New York on condition that certain federal terms be met. New York accepts and utilizes these monies and continues to participate in the federal program. King v. Smith, 392 U.S. 309 (1968) and Solman v. Shapiro, 300 F. Supp. 409, (D.C. Conn.) aff'd 38 U.S.L.W. 3125 (Oct. 13, 1969), settle that individual recipients have standing to enforce the plan conditions of Title IV and further that "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." King v. Smith. 392 U.S. at 333, n. 34 (1968). The conflict set forth herein is between Section 131-a, an integral part of New York's plan for participation in AFDC, and the terms of Section 402 (a) (23), a federal plan condition. If that conflict exists, New York "has breached its federally-imposed obligation to furnish 'aid to families with dependent children'" in compliance with the Federal Act. King v. Smith, 329 U.S. at 330.

II.

The conflict turns on the meaning and application of Section 402(a)(23), an act of Congress, whose terms are neither vague nor uncertain in operation. Viewed against the rudiments and problems of public assistance administration, and following the canon of "construing laws as

saying what they obviously mean," Roscher v. Ward, 279 U.S. 337, 339 (1929), there is not a fair contest between probabilities of meanings. The statute admits of but one intelligible and rational will of Congress.

The terms of the statute operate upon well-known radiments of state AFDC plans-standards of need and maximums. By looking to "the amounts used by the State to determine the needs of individuals," and "changes in living costs since such amounts were established," the statute fixes upon a State's need standard in force during a base period, the time of enactment in January 1968. It requires a cost of living adjustment to that entire need standard by July 1, 1969. In states without maximums. the repriced standard is fully reflected in the amount of aid paid to families. The cost of living adjustment is automatically passed on to AFDC families (though their actual purchasing power remains the same as it was when the amounts were last established). For states utilizing maximums during the base period, the statute goes on to mandate that "any maximums . . . will have been proportionately adjusted." The adjustment to the need standard may not be nullified by ceilings on the amount of aid paid. The only variable among the states is the repricing factor, which depends upon the cost of living changes in each state from the time it last established its need standard. The overall effect in all states is thus to require a maintenance of effort in retaining grant levels commensurate with those prevailing in January 1968, with the addition of one cost of living increase geared to the extent of each state's effort in meeting its own need standard in January 1968. The language of the statute is not ambiguous and its operation is certainly not complex.

III.

The legislative background and evolution of 402(a)(23) affirms its unambiguous, albeit modest, purpose. That no state affords AFDC payments at levels that encourage broken families "to maintain and strengthen family life . . . and to attain or retain capability for maximum support and personal independence," the national objectives of AFDC, 42 U.S.C. §601, has been a source of pervasive federal concern since the initial venture of 1935. Federal responses are expressed in a series of expanded federal requirements and vastly increased federal financial participation. Concerns with inadequate payments undermining national purposes culminated in 1967 in the then-Administration's proposal to require all states to pay need in full under annually updated standards. The controlling and long accepted recognition of the inherent and large variations among the several states in wealth and living costs led to the modification of this far-reaching proposal in the Senate Finance Committee, whose bill, after amendment in the Conference Committee, became 402(a)(23). The evolution of §402(a)(23) from the Administration's initial proposal leaves no doubt that Congress, and its specialist committees, fully appreciated the language, import and effect of the statutes as finally enacted. Plain meaning and plain statements of the committees are not undercut by Respondent's invocation of some supposed arcane mysteries of the legislative process, particularly the acquiescence of an assumed opposition in the midst of reaching an overall legislative accord on omnibus legislation. The statute, as enacted, does not represent a fundamental alteration in the federal-state relationship in grant-in-aid programs and indeed is not without recent precedent in such programs. While a departure in AFDC, the statute reflects the well-established congressional pattern of accepting variations among the several states and assuming greater federal financial responsibility for states with lesser wealth and lower levels of aid.

IV.

New York has transformed its need standard in force in 1968 by the elimination of the differential amounts used to meet the needs of older children for food, clothing, educational and social necessities, and by the elimination of all the amounts administered as critical supplements to the semi-monthly grant, excepting rent. The effects of these transformations are seen not only in the severely reduced AFDC budget, but in their impact on the Petitioners before this Court. New York has not merely consolidated its standard of need, but has reduced the content of the standard. It has cut welfare grants to meet the exigencies of a state budget in violation of an Act of Congress.

V.

The District Judge had power to decide the pendent federal claim, following remand from the three-judge court. Federal power to decide the federal statutory claim did not expire when the constitutional claim was held moot. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). As jurisdiction over the claim was vested in the District Court by 28 U.S.C. §1343(3) not §2284, the dissolution of the three-judge court left the remaining claim properly before Judge Weinstein.

The District Judge did not abuse his discretion in exercising power over the pendent federal claim. Under United Mine Workers v. Gibbs, supra, a full trial had been held on the issue, and both Petitioner and Respondent recognized the urgent need for adjudication before July 1. Respondent did not request the District Judge to decline further jurisdiction.

The reasoning of the Circuit Court was that, in view of the relief sought and the "pendency" of H.E.W.'s review of §131-a, jurisdiction must be declined. This is to say the case is "almost" non-justiciable and "almost" unripe. These are not proper bases for declining pendent jurisdiction. The discretionary limitations on the exercise of federal power to decide pendent claims serve to allocate cases between federal and state courts. This case could be refiled in state court, and that court would not be able to avoid the very same issues of justiciability and ripeness under federal law. In view of the investment of resources in federal court, burdening state courts with these far-reaching federal issues is erroneous. The case should be decided now.

Under well-settled principles, the Circuit Court's unarticulated fear that the case was non-justiciable, or almost unripe, were groundless. Relief is available here under Ex parte Young, 209 U.S. 123 (1908); the decree does not require state expenditures, and the fact that the state may prefer to spend money, rather than choose other alternatives, raises no question of federal power. Under King v. Smith, 392 U.S. 309 (1968), it is settled that judicial decision of Social Security Act claims is not to await H.E.W. action. H.E.W. merely negotiates, and recipients have no right whatsoever to require initiation

of an H.E.W. proceeding or to participate in any that H.E.W. might initiate on its own.

VI.

The statutory claim herein is properly maintained pursuant to 42 U.S.C. §1983 because it seeks redress of "rights" "secured" by the "laws" of the United States. Both 28 U.S.C. §1343(4) and 28 U.S.C. §1343(3) confer jurisdiction over any such claim. Section 1983 is a statute "providing for the protection of civil rights," within the meaning of §1343(4). It is, as history makes clear, a statute "providing for equal rights" within the meaning of §1343(3). As §1983 is intended by Congress to create a federal remedy against state action illegal under federal law, it would be anomalous to require some such claims to be maintained in state courts.

28 U.S.C. §1331 also creates an independent basis of jurisdiction for this suit. The claim arises under federal law, and the amount in controversy was found by the District Court to be greater than \$10,000. The Court of Appeals ruling that damages from impaired health, malnutrition, and lessened educational opportunity are "indirect and speculative" and therefore not to be evaluated is erroneous under this Court's holding in Oestereich v. Selective Service Local Board No. 11, 392 U.S. 233 (1968). It is also erroneous because the very damage Congress sought to prevent by enactment of 42 U.S.C. §602(a)(23) was precisely those harms resulting from reduction of subsistence grants. Accordingly, such harms are properly to be estimated in adjudicating the amount in controversy. Furthermore, the direct loss of income exceeds \$10,000 under this Court's holding in Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947).

I.

New York has breached its federally-imposed obligation to furnish aid to families with dependent children in compliance with the terms and conditions of the Federal Act.

Petitioners' major premise is simply stated: New York State must comply with federal law in welfare matters as in all others. The claim before this Court invokes the AFDC Title of the Social Security Act, pursuant to which Congress has made huge sums available to New York State on condition that certain federal terms be met to maintain national program objectives. King v. Smith, 392 U.S. 309 (1968), and Solman v. Shapiro, 300 F. Supp. 409 (D.C. Conn. 1969), aff'd 38 U.S.L.W. 3125 (Oct. 13, 1969), settle that individual recipients have standing to enforce the plan conditions of Title IV. King and Solman further settle that "any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." King v. Smith, supra at 333, n. 34 (1968); Solman v. Shapiro, supra. See also Shapiro v. Thompson, 394 U.S. 618 (1969). The conflict to be shown here is between Section 131-a. New York Social Services Law, an integral part of New York's plan for participation in AFDC, and the terms of 402(a) (23), on which New York's use of federal money is conditioned. If the conflict exists, New York "has breached its federally-imposed obligation to furnish 'aid to families with dependent children'" (King v. Smith, supra at 330), in compliance with the Federal Act. We turn to that conflict, first setting forth the requirement imposed by the Federal Act and then the manner in which New York's AFDC plan offends that requirement.

The meaning of 402(a)(23), a statute of Congress, cannot be ascertained either by pejoratively terming it a narrow technical provision or "a gesture of uncertain meaning," H.E.W. Lampton Brief A-26, or by ascribing to it a plethora of meanings and purposes which reduce congressional action to an unintelligible, if not ludicrous, exercise in futility. The subject matter of this statute, state AFDC need standards and maximums, is not one unfamiliar to the Congress or the specialist committees dealing with Social Security Act legislation for well over three decades. This is not a case of broad delegation of law-making powers over an uncharted area. Cf. Textile Union Workers of America v. Lincoln Mills of Alabama. 353 U.S. 448 (1957). We submit that this statute, on its face and projected against the rudiments and problems of public assistance administration apparent to the Congress in 1967, see United States v. American Trucking Assn's, Inc., 310 U.S. 534, 543 (1940), admits of but one intelligible and rational will of Congress. So viewed, there is not a fair contest between probabilities of meanings. The state and federal expenditures entailed in a maintenance of effort under 402(a)(23) were facts obvious to Congress and its judgment on the necessity of such expenditures is for our purposes final. New York's fiscal concerns were and are well expressed in the national legislative process, in which New York is not an unheard voice. Cf. United States v. Carolene Products, 304 U.S. 144, 152, n. 4 (1938); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). That process has reached a conclusion and a command in 402(a)(23) which is binding on New York. To intelligently expound that command we set out in some detail the background and evolution of 402(a)(23) in the context of the Aid to Dependent Children program.

A. The Language of 402(a)(23) Is Without Ambiguity and Clearly Reveals What Is Required of the States.

We begin with the words of the statute to ascertain its meaning, since "there is no canon against using common sense in construing laws as saying what they obviously mean." Roscher v. Ward, 279 U.S. 337, 339 (1929). Unlike many of the AFDC statutory conditions necessitating supplementary elaboration, e.g., §402(a)(4), 42 U.S.C. §602(a)(4) ("fair hearing"), the command of 402(a)(23), directed at public welfare officials, is neither open-ended nor broad. See Addison v. Holly Hill Fruit Co., 322 U.S. 607, 616 (1944). Indeed, the original interpretive H.E.W. regulation to the states merely restated the statute practically verbatim, 33 Fed. Reg. 10230 (1968), and the recently expanded regulation of January 23, 1969, is itself not elaborate. 45 C.F.R. §233.20(a)(2)(ii), 34 Fed. Reg. 1394 (1969). The statute provides:

"A State plan . . . must

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of

²⁴ The original regulation provided:

[&]quot;A State plan . . . must . . . provide that by July 1, 1969, a State standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

aid paid to families will have been proportionately adjusted."

The terms used are familiar indeed in public assistance administration in all states. "The amounts used by the State to determine the needs of individuals" is a comprehensive description of a state's standard of need (also called standard of assistance), which has long been central in public assistance plans "to identify needy individuals and to establish the amount of assistance." 42 U.S.C. \602 (a) (1), H.E.W. Handbook of Public Assistance, Pt. IV. 63120. Pursuant to long-standing federal requirements, each state assigns monetary amounts to the component items it deems essential for decent family life (i.e., food, dothing). 45 C.F.R. §233.20(a)(2)(i), 34 Fed. Reg. 1394 (1969). These amounts theoretically enable families to purchase the required quantity of these essentials.25 Federal law has not specified any of the items or the costs to be assigned, H.E.W. Lampton Brief A-16; hence the states have been free to determine their own standard of need. King v. Smith, 392 U.S. 309, 318 (1968). The compendium of all these amounts is the need standard by which the recognized requirements of an AFDC family at any given time are determined. The level of benefits in all states is based upon the standard of need. 45 C.F.R. §233.20(a)(2) (i), 34 Fed. Reg. 1394 (1969). In about 29 states, including New York, this standard (or the budgetary deficit, after deduction of income) is paid in full and hence is the sole determinant of the amount of aid paid to families with

²⁵ "[F]acts must be established as to the money amounts necessary to secure the State's defined standard." H.E.W. Handbook, Pt. IV, §3120.

dependent children. Other states, now 31 in all,20 once determining family requirements through the standard of need, establish a ceiling on the amount of aid to be paid, which the grant may not exceed. The standard of need remains the determinant of payment, but here in combination with a maximum, which may be expressed in dollar limits per child varying with family size27 or in an ultimate dollar ceiling per family regardless of size.28 It may also be derived through application of a specified percentage factor to the standard of need (or budgetary deficit), which upon application produces a dollar ceiling on the amount of aid to be paid.20 Serving the identical purpose of limit-

²⁶ National Center for Social Statistics, Social and Rehabilitation Service, Department of Health, Education and Welfare, Report D-3 (October, 1968), Tables 2, 3. Hereafter cited as NCSS Report D-3. Two other states, Oregon and Idaho, formerly paid less than full need. House Comm. on Ways and Means, Section by Section Analysis of H.R. 5710, 90th Cong., 1st Sess., p. 36.

²⁷ For example, \$80 for a parent and one child, \$110 for a parent and two children, and so on.

²⁸ For example, \$175 for a parent and five or more children.

For example, if the need standard is \$60 a month and the State pays 50% of the need standard, an individual without other income would receive aid in the amount of \$30. For individuals receiving aid to supplement income, not often the case in AFDC, states may apply the percentage to the need standard, and then subtract income, paying the deficit. Hence in the above example, if there is \$30 monthly income, the amount of aid to be paid is zero. States may also deduct income from the need standard and then apply the percentage factor to the remainder, or, as it is called, the budgetary deficit. The above individual with \$30 income, deducted from the need standard of \$60, reduced by the 50% factor, would receive \$15 in aid. The application of the percentage factor to the budgetary deficit thus allows for more supplementation than the application of the percentage factor to the need standard, the first method described above. States use both methods.

ing welfare expenditures by creating a disparity between the standard of need and the amount of payment, these mechanisms are often used in combination, as in Mississippi which pays 27 percent of its need standard, but no more than 25 dollars for the first child (\$15 for the second) or 90 dollars for an AFDC family regardless of size. Though without mention in the federal statute or regulations thereunder until after the enactment of 402(a)(23), these state-imposed ceilings have been in use since at least 1938.

The operation of 402(a)(23) in those states that meet need in full is unmistakable. By looking to the amounts used to determine need, and changes in living costs since they were last established, the statute perforce fixes upon the standard of need in effect during a base period, the time of enactment of the statute in January, 1968. "The amounts used by the State to determine the needs of individuals" equally leaves no doubt that the adjustment must be to a state's entire standard of need in force during that period. Plainly, a state may not pick and choose among the items to be repriced or later omit essentials included within the base-period standard. Nor need it, of course, include additional items.

²⁰ Of the eleven states utilizing ratable reductions to reduce the level of payment to recipients, six (Virginia, West Virginia, Alabama, Kentucky, Mississippi and New Mexico) also impose family dollar maximums on assistance. Two of these states (Alabama and Mississippi) use individual dollar maximums as well. Colorado combines individual dollar maximums with a ratable reduction. NCSS Report D-3, Tables 2, 3.

³¹ Bureau of Social Science Research, Inc. The Legislative History of Aid to Dependent Children: A Chronological Account and Analysis of the Federal Legislative Process (1969), at 95.

The effect of the adjustment is also obvious. Since by definition the standard of need is the determinant (deductible income aside) of the level of aid in states meeting need in full, the repriced standard of need is, without more, fully reflected in the amount of aid paid to families with dependent children. The cost of living increase is passed on to AFDC families (though their actual purchasing power remains the same as it was when the amounts were last established).

The operation of the statute in those states where a maximum in conjunction with the need standard determines the level of aid is also clear. In recognition of those 33 states then paying less than full need, the statute goes on to mandate that "any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." Here the statute focuses upon the need standard and any maximums in force during the base period and does not allow the adjustment to the need standard to be nullified by the ceiling. Where the ceiling is expressed in dollar amounts, per person or family, application of the cost of living factor to the need standard and the dollar limit results in an increase in the amount of aid paid. The amount of that increase is proportionate to the previous relationship between the standard of need and the maximum. 92 Similarly, where the limit is derived from a percentage factor, the adjustment of the need standard results in an increase in the amount of aid to be paid, as also pro-

⁸² E.g., where a need standard for a family of two is \$10% the maximum \$80 and the cost of living factor 10%, the adjusted need standard is \$110 and the adjusted maximum is \$88.

³³ E.g., where need is \$100, the State pays 80% of need, and the repricing factor is 10%, the adjusted need standard is \$110 and the adjusted amount of aid is \$88, as in the above example.

portionate to the previous relationship between need and the maximum payment.³⁴ Hence, the cost of living increase is passed on to AFDC families in these states, too, diminished only by the extent to which these states paid less than full need in the base period.

The only variable among the states is the repricing factor, which depends upon the cost of living changes in each state from the time it last established its need standard. The overall effect in all states is thus to require a maintenance of effort in retaining grant levels commensurate with those prevailing in January, 1968, with the addition of one cost of living increase geared to the extent of each state's effort in meeting need in January, 1968. The language of the statute is not ambiguous and its operation is certainly not complex.

B. The Background of 402(a)(23) Reveals the Central Problem Behind Its Requirements.

It has long been recognized that no state affords assistance payments allowing for healthy and decent family life, no less allowances that encourage broken families "to maintain and strengthen family life . . . and to attain or retain capability for maximum support and personal independence," which are the national objectives of AFDC. 42 U.S.C.

^{*}Where the percentage factor is applied to the adjusted standard of need, and there is income to be deducted, minor adjustments are necessitated by the distorting effect of deducting income, which is a constant. This adjustment is required for the relatively few AFDC families who receive aid in supplementation of earned income. It is not required where the percentage factor is applied to the budgetary deficit, after deduction of income from the recognized amount of need. See note 29, supra.

§601. Ti is also well known that inadequate amounts of aid result from the imposition of maximums, the exclusion of essential items in the standard of need, the initial assignment of unrealistically low prices to the items included, and the failure to keep pace with living costs. H.E.W. Lampton Brief A-17. Prior to 1968, thirty-three states paid less than their own standard of need, and no state's standard of need contained any amenities or all common necessities. The state of the

New York is illustrative, affording as it did prior to the cutback one of the highest average per person or family AFDC allowances in the nation. Let us first recognize that the highest meant approximately \$70 per week to cover all living expenses of a family of four (91, 106). Many basic items were excluded from its standard of need, e.g., newspapers, books, a radio, gifts for children, and so on. Such supposed luxuries could only be purchased at the sacrifice of some other necessity and the only flexibility is found in the 85 cents (now 65 cents) daily allowance for food. New York's standard also included unrealistically low cost estimates for many of the budgeted items, including food, clothing, and furniture.³⁷ The substantial and

^{35 &}quot;Most States do not make adequate assistance payments." H.E.W. Lampton Brief A-17.

³⁶ House Committee on Ways and Means, Section by Section Analysis of H.R. 5710, 90th Cong., 1st Sess. (1967), p. 36. Hereafter cited as Analysis of H.R. 5710.

^{**}For example, the budgeted allowance for the cost of food is computed on the basis of the U. S. Dept. of Agriculture's "Low-Cost" Food Plan, though the inadequacies of that food plan are widely acknowledged. It projects that poor people will buy 51% less meat (emphasizing grains and cereals instead) than studies that reveal that they actually do purchase. See, e.g., Haber, Poverty Budgets: How Much is Enough, Poverty and Human Resources Abstracts, Vol. 1, No. 2, p. 107 (1966); Orshansky, Counting the Poor: Another Look at the Poverty Profile, Social Security Bul-

uncontroverted evidence in this case well makes the point. Mitchell I. Ginsburg, Commissioner of Human Resources, former welfare commissioner, stated "I know of no study [of low income budgets] . . . which does not set a level substantially higher than the existing welfare grants" (39, Tr. 76). See also 40, Tr. 78; 43, Tr. 84; 43-44, Tr. 85; 44-45, Tr. 87. Jack Goldberg, New York City Welfare Administrator averred: "It has been my own professional view, and studies done by others [show] that we have not met the standard minimum that people need in this city to maintain themselves" (55, Tr. 106). Joseph H. Louchheim, the Respondent's Deputy Commissioner, acknowledged that AFDC families "of necessity have learned to squeeze every penny" (277, Tr. 143). Joseph Barbaro, Commissioner of Social Services for Nassau County, added that "the present standards of assistance provide for life on a level of subsistence, nothing more, and often less." Affidavit, Doc. No. 34. The characteristics of impoverishment—high infant mortality, malnutrition, stunted education performancewere and remain commonplace among AFDC families in New York. 38

Thus, even in a leadership state in AFDC, the inadequacies in the grants paid were gross and the human con-

letin, Vol. 31, no. 3, at p. 5 (Jan., 1965). The actual food grants in New York fell significantly short of even the "Low-Cost" plan since inflated reliance was placed upon the prices which the component items cost in such places as city markets and upstate stores, where city welfare recipients obviously do not shop. The cost estimates for major items of clothing and furniture were made on the assumption that all these items would be purchased at the Salvation Army or Goodwill, an assumption which ignores the obvious fact that these private social agencies could not possibly supply all of the clothing and furniture needed by the 850,000 AFDC recipients in New York State.

ss See note 21 supra.

sequences disastrous. Members of Congress, like most men, were not unaware of these facts.

C. Federal Concern With AFDC Payments in All States Does Not Begin With 402(a)(23).

Section 402(a)(23) is not an unusual departure from well-established federal concerns. Congressional consideration and responses to the level of benefits in a program whose central task is to provide a guarantee against the consequences of economic deprivation dates back to the initial venture in 1935, when both federal financing and the understanding of federal powers were substantially more constricted. Cf. Shapiro v. Thompson, 394 U.S. 618, 640 (1969). In the very first bill we find serious discussion of a requirement that the states afford "reasonable subsistence," 80 which was not adopted in recognition of the inherent and large variations among the several states in wealth, living costs and social and economic conditions. Recognition of these differences continues throughout the years to control federal responses to the problem of grant levels in the several states. A more certain view of federal powers and experience under the Act led to an expanded network of federal controls, including a series of prohibitions on exclusionary mechanisms used by states during periods of fiscal difficulty.40

^{**} House Comm. on Ways and Means, Economic Security Act Hearings on H.R. 4120, 74th Cong., 1st Sess. (1935).

⁴º In 1950, for example, in order to limit certain practices previously used by the States to conserve resources (such as refusing to accept or approve new AFDC applications or the use of substitute father statutes and regulations) Congress required that "Aid . . . be furnished with reasonable promptness to all eligible individuals" and "that all individuals wishing to make application . . . shall have an opportunity to do so." 42 U.S.C. §602(a) (10). See H. Rep. No. 1300, 81st Cong., 1st Sess., pp. 48-148 (1949).

Inadequate grants resulting from both deficient standards of need and the use of maximums were repeatedly documented to the Congress during the early years and periodically thereafter. Citing the above differences among the states as inconsistent with a federal standard, Congress time and again increased the federal matching formula (from a national overall average of 13% in 1936 to 43% in 1947 to 55% in 1964),41 with special emphasis upon considerably more federal responsibility for those states with lesser wealth and lower payments.42 In 1958 Congress authorized an averaging formula to accommodate greater individualization in spartan AFDC need standards.48 Although the focus in 1962 was on vocational training and family services to reduce dependency, the Congress was then again urged to require "reasonable standards" of assistance. It responded by making mandatory a separate grant for the parent or caretaker of dependent children to insure the economic security of the entire family, 42 U.S.C. §606(b)(2) and by authorizing an H.E.W. Advisory Council on Public Welfare to undertake a comprehensive review of public assistance payments and the federal-state relationship. 42 U.S.C. §1314. In 1965, Congress again increased the AFDC matching formula, 42

Welfare In Review, Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 13, p. 17.

The federal percentage for each state is based on per capita income and the federal government bears the major part of the first \$18 per child outlay in AFDC and \$37 in Aid to the Aged. 42 U.S.C. §§603(a), 303(a). This has been true throughout the years. See also Welfare in Review Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 15, p. 19, setting forth percentages of federal matching. These ranged in 1965 from a low of 41.0% in Minnesota to 82.4% in Florida.

⁴⁴ U.S.C. §603(a).

U.S.C. §603(a), and through allowing use of the Medicaid formula, substantially increased federal matching for the wealthier states by removing the federal ceiling on participation, insuring no less than 50 to 65 percent regardless of the amount of aid paid in AFDC and the adult programs. 42 U.S.C. §1318; H.E.W. Handbook, Pt. V. \$2233." It also required through the matching formula the states to maintain and improve on their respective efforts in 1965. 42 U.S.C. \$1317. Concern over the failure of states to maintain and increase efforts under these in. ducements culminated in the prominent H.E.W. Advisory Council Report "Having the Power, We Have the Duty," which found that "public assistance payments are so low and so uneven that the Government is . . . a major source of the poverty on which it has declared unconditional war." 45 State standards of need and levels of aid, with their relationship to the well being of dependent children, were not new to the Congress or its committees in 1967.

D. The Legislative Evolution of 402(a)(23) Leaves No Doubt on the Intended Meaning and Effect of 402(a)(23).

Section 402(a)(23) begins with the Advisory Council Report recommending to the then Administration that

^{**}For example, the higher benefit states received increases from approximately 40% federal share to 50% or higher. Federal contributions to New York rose from 42% to 50%. Welfare In Review, Department of Health, Education and Welfare, Statistical Supplement, 1966 ed., Table 15, p. 19.

⁴⁵ "Having The Power, We have the Duty," Summary of Recommendations to the Secretary of Health, Education and Welfare by the Advisory Council on Public Welfare, p. 2 (June 29, 1966).

"A floor of required individual and family income . . . be established for each state . . . to constitute the minimal level of assistance which must prevail in that state." "

The Administration in 1967 submitted its comprehensive reforms of the Social Security Act to the House Committee on Ways and Means, H.R. 5710, which included, inter alia, proposals . . . "designed to increase the adequacy of public assistance payment," 47 by requiring the states in the four categorical assistance programs to meet in full their own standard of need in force during a base period and to reprice such standards by July 1, 1969, and annually thereafter. Focusing on "adequate support for needy children," the Administration observed that "although a few States define need at or above the poverty

[&]quot;Having The Power, We have the Duty," Summary of Recommendations to the Secretary of Health, Education and Welfare by the Advisory Council on Public Welfare, pp. 2-3 (June 29, 1966).

[&]quot;Analysis of H.R. 5710, p. 1.

The Administration proposed that the States be required to provide:

[&]quot;... effective July 1, 1969, for meeting ... all the need, as determined in accordance with the standards applicable under the plan for determining need, of individuals eligible to receive aid to families with dependent children (and such standards shall be no lower than the standards for determining need in effect on January 1, 1967) and ... effective July 1, 1968, for an annual review of such standards and (to the extent prescribed by the Secretary) for up-dating such standards to take into account changes in living costs."

House Committee on Ways and Means, Hearings on H.R. 5710, 90th Cong., 1st Sess. (1967), p. 59.

level, no State pays as much as that amount," and that though "about half the States updated their minimum standards this year [1967], most States have not been doing so annually." No additional federal sharing was suggested, save for a discretionary 60 million dollars for the initial two fiscal years to relieve hardship in certain states resulting from all of the additional public assistance requirements of H.R. 5710, including those in the adult programs. The matter was explored before the House Committee, but the bill reported out as H.R. 12080⁵¹ sub-

⁴⁹ Analysis of H.R. 5710, p. 36.

^{**}O "The Secretary would be authorized to make grants totalling not more than \$60 million each year . . . to assist States in meeting the costs of other requirements imposed by these amendments. In making such payments, the Secretary would, among other factors, consider the fiscal ability of the State, its fiscal effort for welfare and related programs, the effect of increases in social security benefits, and the amount of State and local funds required in order to comply with the new provisions." Analysis of H.R. 5710, p. 9. These requirements included the Administration's substantial income exemption for AFDC recipients and the requirement affecting 33 states of paying need in full.

s¹ For AFDC, the bill included a substantial mandatory income exemption (Section 202(b)), a mandatory work and training program for AFDC mothers (Section 204), and a federal limitation for purposes of federal matching, on the number of children whose eligibility is based upon a parent's absence from the home, the so-called AFDC freeze (Section 208). Senate Committee on Finance, Social Security Amendments of 1967, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967) pp. 117-128, 142.

The freeze placed a federal ceiling on the number of dependent children in the absent parent subcategory for whom federal AFDC contributions would be made; the ceiling was to be determined by the ratio of such children receiving AFDC to the number of children residing in the State during a base period. Expressing concern over the rising numbers of abandoned children, the latter proposal was deemed necessary to coerce the states to make ade-

stantially differed from the Administration's submissions, save for the substantial increase in Social Security benefits for 23 million persons.⁵² Under the traditional rule of no floor amendments and limited debate, H.R. 12080 passed the House with near unanimity on the strength of the increase in Social Security benefits.⁵³

The Administration, through H.E.W. Secretary Gardner and Under Secretary Cohen, redoubled its efforts before the Senate Finance Committee, particularly in regard to the AFDC proposal for annual updating and meeting need in full, which was afforded first place in H.E.W.'s submission of public assistance amendments.⁵⁴ The Administration and seven senators urged that full payment of an annually updated AFDC standard of need was essential

quate use of the remedial, training, and family services programs of the 1962 amendments, as well as the Work Incentive Program.

On the floor of the House, Rep. Mills, Chairman of the House Ways and Means Committee explained:

"We tried 1962 to get the States to provide this training and to put it into effect. They refused to do it. If we do not put some degree of coercion upon the States, in my opinion they are going to be perfectly willing to do as they have done in the past, to hand out a welfare check and not do anything more for these poor people who need everything man can do to improve their condition to be done for them.

"Yes, this freeze provision is for the purpose of putting pressure on the States, to make the rest of the program work, and only for that purpose." 113 Cong. Rec. 36367 (1967).

The debates in Congress were thereafter to center on these controversial provisions and the extent of the Social Security increase.

⁸² Analysis of H.R. 5710, p. 49.

^{13 113} Cong. Rec. 23132 (1967).

³⁴ Senate Committee on Finance, Social Security Amendments of 1967, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), p. 716.

to reduce dependency.⁵⁵ Support before the committee was broad-based, with a large number of public officials and leaders of private organizations stressing the necessity for an increase in AFDC payments.⁵⁶ Opposition was primarily directed to the payment of full need requirement, particularly on the ground that there was no substantial appropriation to cushion the impact in those states then using maximums, where, because of their lower per capita income, federal fiscal responsibility traditionally has been far greater.⁵⁷

The Senate Committee dropped this proposal but adopted the balance of the administration bill requiring

⁵⁵ Secretary Gardner described the inadequate levels of payments in the States resulting both from the failure to update the need standard and the imposition of maximums. *Id.*, at 216-17. Undersecretary Cohen testified in depth that the failure in 1962 Service-Programs and the rising AFDC roles were owing to the dependency and deprivation suffered under current levels of payment. *Id.*, at 258-9.

Those Senators speaking in favor of the proposals to increase grants included Brooke (R. Mass.), Javits (R. N.Y.), Kennedy (D. N.Y.), Kennedy (D. Mass.), Morse (D. Ore.), Tydings (D. Md.), Burton (D. Calif.). *Id.*, at pp. 826-31, 903-06, 1397-1406.

⁵⁶ For example, Mayor Lindsay of New York City stated that AFDC payments "... are too low to sustain even a minimal, decent standard of living" and urged the adoption of the Administration proposal. *Id.*, at 1131-32, 1144-45. George Meany spoke even more strongly in support of the Administration proposal, including the full need requirement which would itself "... permit only a slight improvement in the abysmally low level of welfare payments." *Id.*, at 1419-20 and 1446ff.

⁸⁷ House Committee on Ways and Means Hearings on H.R. 5710,
90th Cong., 1st Sess. (1967), pp. 1581, 1713, 1761-63, 1784-85,
1787, 1792-94, 1869-70, 1944-45. Cf. Id., at 1581, 1713. Senate
Finance Committee Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), pp. 1293, 1298, 1303-04; Cf. Id. at 941, 1942.

in AFDC a cost of living adjustment by July 1, 1969, and annually thereafter. Deleting the payment of full need requirement, the Senate Committee now modified the language to require that "any maximums... on the amount of aid" be proportionately adjusted. The provision read:

"Paragraph (5) of Section 213(a) ... requires a State plan for the dependent children program to provide that by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted." S. Rep. No. 744, 90th Cong., 1st Sess., p. 293 (1967).

Its plain requirements were summarized in the Senate Committee Report:

"States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969, and to reprice them at least annually thereafter, adjusting the standards and any maximums imposed on payments to reflect changes in living costs." Id., at 170.

Although the Committee observed that its AFDC provisions "would require the States to take on new and expensive tasks," the expansive federal matching formula and continued state efforts were relied on to finance these changes. *Id.* at 166.

The Committee also reported out a companion provision which required a mandatory \$7.50 monthly increase

(reflecting the amount of the cost of living adjustment in Social Security benefits) for recipients in the Adult programs, half of whom receive such benefits. This change, too, was to be accomplished through the adjustment of standards used for determining need and any maximums on the amount of assistance in force during a base period. Restoring many of the Administration's proposals and adding 295 amendments to H.R. 12080, the Senate Committee rejected the controversial AFDC limitation on federal matching for the absent parent sub-category of cases and reported out the bill on a straight party line vote. 50

Numerous amendments were added on the floor of the Senate. Debate on AFDC centered on the work and training program (WIN), whose requirements, in an amendment sponsored by Senator Robert Kennedy, were made voluntary rather than mandatory. The AFDC program for families with unemployed fathers, on the other hand, was made mandatory in all states, without additional appropriation. To maintain parity between the Adult programs and AFDC, 60 Senator McGovern proposed, as an addition to the AFDC cost of living provision, a mandatory 11 percent (\$4.00 per person) increase 61 for AFDC recipients in all states, effective July 1968, also to be accomplished by adjustment of need standards and maximums. 62

ss S. Rep. No. 744, Senate Committee on Finance, 90th Cong., 1st Sess. (1967), p. 170.

^{59 113} Cong. Rec. 32450 (1967).

^{60 113} Cong. Rec. 33541 (1967).

^{e1} The percentage is based on the national average payment per child of \$37.25 per month. 113 Cong. Rec. 33559 (1967).

⁶² Thid.

Senator Robert Kennedy urged that this provision was necessary to equalize in 1968 the \$7.50 increase in the adult programs; Senator Long pointed out that this amendment would cost 79 million dollars in federal funds and 135 million in state expenditures in 1968.* It was defeated by a voice vote, but condition 24 (now 402(a)(23)) was left intact.* The Senate Finance Committee bill as amended was passed in the Senate by a 78-6 vote.*

The Senate-House Conference Committee restored many of the provisions in H.R. 12080, rendered the \$7.50 increase in the Adult programs optional with the states and adopted the Senate AFDC cost of living proposal verbatim, omitting only the requirement for annual repricing after July 1, 1969. Under the heading of "Increasing Income Of Recipients Of Assistance," the Conference Report read the Senate provision to require that "each state (under its plan for AFDC approved under Title IV) must adjust its standard so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." The Conference Committee restored both the AFDC freeze and the mandatory work program for mothers of AFDC children, while rendering the AFDC program for unemployed fathers optional with the states. **

⁶³ 113 Cong. Rec. 33560 (1967).

[&]quot; Ibid.

es Id. at 33637.

^{**} Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), pp. 62-63; 1967 U.S. Code Cong. & Admin. News, pp. 3179, 3209.

⁴⁷ Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), pp. 58, 60; 1967 U.S. Code Cong. & Admin. News, pp. 3203, 3204.

The overall bill was passed by the House under the limited debate and no amendment rules⁶⁰ and was rushed through the Senate on a voice vote to avoid a pre-Christmas flibuster over the many concessions to the House, particularly the AFDC freeze and the compulsory work program.⁶⁰ Debate in the Senate centered on the misuse of Senate rules in cutting off discussions and on the AFDC coercive provisions, particularly the freeze.⁷⁰ Although the result was predestined by the increase in Social Security benefits, some Senators, including some proponents of 402(a)(23), voted against the overall bill as a matter of principle.⁷¹

^{**} Representative Burton of California reluctantly decided to vote in favor of the bill, stating for the record:

[&]quot;... that at no time has any Member of this House, except those who served in the Ways and Means Committee, had any opportunity to amend and improve this legislation." 113 Cong. Rec. 36379 (1967).

Representative Burton noted that the bill was being considered under a closed rule which prevented amendments. He lamented that there was no opportunity to strike the freeze or the coercive work program. 113 Cong. Rec. 36386 (1967).

^{**} The Conference Report was laid on the table and adopted without discussion, within 30 seconds of the commencement of the Senate session. Id., at 36679. Senator Mansfield, the Majority Leader, objected to these abrupt procedures, noting that although the bill was a very good one in many respects it has abhorent features. Id., at 36680. Senator Long, the floor manager for the bill, indicated his awareness of the possibility of filibuster and the need to adopt the Social Security increases provided in the conference report. Id., at 36680.

⁷⁰ Senator Tydings, for example, spoke out against the mandatory work features of the bill and the freeze. He characterized the freeze as placing an unjustified burden on the cities and the states. *Id.*, at 36765. Senator Young of Ohio noted that the House conferees perpetrated an act of "vandalism" on the most needed and advanced expansion of the Social Security Law by either branch of Congress since 1949. *Id.*, at 36775.

Ti Senators Brooke, Kennedy from New York and Kennedy from Massachusetts, Harris, Williams, Hartke and McGovern all in-

There can be no doubt that these committees and the Congress fully appreciated the language, import and effect of 402(a)(23) as finally enacted. In the first place, the statnte is a self-evident, albeit limited, departure from the tradition of no federally required adjustments to state need standards and maximums, which was apparent to the committees and to the entire Congress. Secondly, the language of the basic repricing requirement remained practically identical throughout the evolution in the committees versed in public assistance administration and there is no hint in either committee of an intention to change the stated purpose of "Increasing Income Of Recipients Of Assistance." Indeed, the House-Senate Conference Committee amended the provision and reaffirmed its purpose. Third, in having before it the companion proposal requiring an increase in the adult programs through adjustment of need standards and maximums, Congress well appreciated the significance and effect of an adjustment to these mechanisms. Moreover, adopting the requirement of a cost of living increase while declining to accept the companion payment-of-full-need proposal, the purposes and effects of

dicated their intention to vote against the bill in spite of its liberal Social Security increases. Id., at 36781-82, 36915, 36921, 36924. These Senators made it clear, however, that they were agreeable to other Senators voting for the adoption of the conference report. Id., at 36918. Senator Muskie and Senator Hartke expressed their intention to vote for the bill largely because of the increases in Social Security benefits provided therein. Id., at 36914, 36918. Senator Muskie noted:

[&]quot;Even if we corrected the pending legislation in line with the Senate version, we would still have a long way to go. Our principal objective must be to use this legislation and its deficiencies as a base from which we can move to reform our society and correct the inequities which stand between millions of our fellow citizens and the promise of our Constitution." Id., at 36914.

both having been explored in committee, Congress made a choice of goals in a well-defined compromise for reasons that are obvious.⁷² Fifth, in using the comprehensive terms "the amounts used by the State to determine the needs of individuals" and then going on to require an adjustment of "any maximums," Congress left little room for evasion or nullification. Finally, in making the pricing adjustment a plan condition for continued participation in AFDC, and allowing ample time for state legislative change and appropriation, Congress unequivocally expressed its intention to compel the states to maintain current efforts in light of inflation.

But Respondent would ignore plain meaning and the plain statement of the committees that well understood the provision by delving deeply into some supposed arcane mysteries of the legislative process. As guides to construction, the arguments range from the specious to the fanciful. To begin with the fanciful, much is made of the placement of 402(a)(23) in the Senate Committee Report, and the greater emphasis afforded the proposed mandatory adult increase. Stress upon the more expensive and immediate

¹³ See infra at 59.

⁷⁸ Referring to the Senate's mandatory extension of Aid to Children with Unemployed Fathers (AFDC-U), "by July 1, 1969," Senator Harris explained:

[&]quot;The only reason why the delayed effective date is necessary is to give States an opportunity to change their State plans without taking away from them in the meantime the federal matching funds for aid to families with dependent children, particularly States in which the legislature does not meet every year. They, especially, will need the additional time in order to change their State plans so as to be in compliance with the amendment." 113 Cong. Rec. 33193 (1967).

See also, H.E.W. Lampton Brief A-11.

Adult provision, which was closely related to the accepted Social Security increases, may be good politics, but it signifies little more. New York and others place heavy reliance on the omission of cost estimates for 402(a)(23) as finally enacted, the implication being that therefore no cost impact could have been expected. This interesting result cannot square with any conceivable application of the statute in many states, particularly those twenty or so that have long met their own need standard. If the provision were to have no cost effect, why did the House conferees amend it to require one rather than annual cost of living adjustments? Why did the Senate Committee group it with the \$7.50 monthly increase for adult recipients under the heading "Increasing Income Of Recipients of Public Assistance"? S. Rep. 744, at 293. Was that mandatory increase to be had through adjustment of need standards and maximums also illusory, so that making it optional with the states in conference was yet another meaningless gesture? The answer is far simpler. Congress indeed knew the costs entailed in the original Administration proposal for meeting need in full under updated standards; the expected federal share for AFDC in fiscal 1970 was 95 million for paying full need and then 90 million for updating," which are rather modest expenditures in the context of national AFDC legislation. Omission of the full need requirement left accurate estimates of cost exceedingly difficult, since the calculation entails an analysis of the variable effects of maximums in thirty-three states. But the federal costs, from 50 to 80 percent of the total, had to be far less than the original estimate of 90 million for updating need stand-

⁷⁴ Senate Committee on Finance, Hearings on H.R. 12080, 90th Cong., 1st Sess. (1967), pp. 721-22.

ards that were to be paid in full. The corresponding costs in the several states were modest, in light of the acceptance of their maximums then in force. These costs are not appropriately measured by the amounts involved in a substantial welfare cutback. The omission of cost estimates from the report of legislative aides to the Conference Committee is thus without significance. For reasons of complexity in calculation, and perhaps political considerations, there also were no cost estimates on the impact of the AFDC freeze in the several states. But it was no less law for that omission.

New York also complains that there was no additional federal appropriation, beyond the 50 to 85 percent matching share, to defray the cost to the states. But realistically viewed, there was no such appropriation for the far broader

⁷⁵ The absence of cost estimates for §402(a)(23) probably also accounts for its omission in the discussion of the numerous amendments to the Social Security Act in the "Summary of Social Security Amendments of 1967," Joint Publication, Committee on Finance of the U.S. Senate and Committee on Ways and Means of the U.S. House of Representatives, 90th Cong., 1st Sess. (1967). The summary is a report "[p] repared by the staff of the Senate Committee on Finance and the House Committee on Ways and Means for the use of the two Committees." Section 402 (a) (23) was obviously considered by the Joint Senate-House Conference Committee as well as by the Senate Finance Committee and House Committee on Ways and Means. The Conference Committee amended 402(a)(23) and approved it as amended. See Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967). The Congress then passed the provision and the President signed it into law. Under such circumstances, it seems incredible to give the omission of discussion in a staff report the effect of repealing or modifying a provision of the United States Code.

⁷⁶ 113 Cong. Rec. 36377 (1967). The proponents of the freeze argued, perhaps unconvincingly, that it would have little, if any, impact. *Id.*, at 36368, 36911-12. But see, *Id.*, at 36765, 36775-76, 36815.

Administration proposal or for the proposed mandatory increase in the Adult programs, save for a very modest discretionary fund to assist states in special circumstances (e.g., a change from a low maximum to paying need in full). Additional federally imposed requirements in 1967, and before, rarely do more than rely on the federal monies afforded under the matching formulas, which are no mean part of total expenditures in AFDC. And whatever the political configuration within the Congress of 1967 over specific provisions, all agreed that the states had not discharged their responsibilities in reducing dependency under a series of federal financial inducements and that further inducements were not appropriate. Federal requirements, not federal monies, were the order of the day in 1967; 402(a)(23) was one of these requirements.

New York then points to the rejection of the flat \$4.00 per child increase for 1968, as indicating the expectations for 402(a)(23). But this ignores the far different impact of a flat per-person increase in the several states and also the cost adduced for this provision, greater indeed than that attached to the Administration's original proposal for full need and updating. It also fails to recognize that this provision was an addition to, not a substitution for 402 (a)(23), with a rather distinct purpose of paralleling the 11 percent increase in the Adult programs.

There is finally the argument that those who should have, it is assumed, opposed 402(a)(23) did not make much of it on the floor of Congress. Even assuming for the moment that 402(a)(23) should have been a source of controversy, this argument is to wrench the provision out of its total legislative setting in 1967. The Social Security Act Amend-

ments of 1967 were omnibus legislation, entailing some initial 200 proposals, covering five Titles of the Social Se. curity Act, 77 several hundred House and Senate Committee amendments's and finally an overall agreement on this amalgam. As this history makes clear, there were many divisions between the House and Senate, and their respective Committees, over the Administration's proposals and the House transformations, particularly in AFDC.70 Although all agreed that reducing dependency was the goal. the Administration and Senate proponents securing enactment of 402(a)(23) acted on the conviction that disturbingly low levels of aid impaired capacity for independence. kept families on AFDC, and accounted for the steady increase in the rolls.*0 To be sure they were also concerned with the well-being of deprived children. The House Committee evinced several different concerns, and found the answers in controversial work, training and service programs, with coercion on the states to implement them. The final enactment was a well-defined compromise between the House and Senate. The House receded on 402(a)(23): the Senate receded on the AFDC freeze and mandatory work program. In this setting acquiescence in provisions that one political grouping or another might not approve,

[&]quot; Analysis of H.R. 5710.

⁷⁸ Senator Boggs noted that the Senate added 295 amendments which were not included in the House bill, and stated:

[&]quot;I would say, on behalf of the conferees on both sides of the aisle, that each one of these amendments was considered in detail by the conferees." 113 Cong. Rec. 36367 (1967).

See also Id., at 36377, 36379, 33628-30.

⁷⁹ See, e.g., 113 Cong. Rec. 36765, 36775, 36781-82, 36915, 36919, 36921, 36923.

so See note 39, supra.

or indeed might vociferously oppose on another occasion, is inherent in the legislative art of compromise and accord. This Court has before noted that "the fears and doubts of the opposition are no authoritative guide to the construction of legislation." Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 391 (1951). See also, Mastro Plastic Corp. v. NLRB, 350 U.S. 270 (1956). Piercing the silence of an assumed opposition in the give and take of the legislative process in reaching an accord is no less formidable or more reliable an undertaking. This is particularly true with regard to Social Security Act legislation, which, rather more than most, is the handiwork of specialist committees, dealt with by the Congress under rules restricting both debate and floor amendments. As we have seen, the final product of the House-Senate conferees in 1967 was passed as an entirety, after very limited debate. The result was predestined. Attention was focused on several controversial provisions which well took up whatever debate there was. Section 402(a)(23) was not one of these controversial provisions, for reasons that, as we shall see, are not mysterious. But both the views of the House and the Senate are reflected in the 1967 amendments and those of the Senate and the then-Administration are reflected in 402(a)(23). Neither of these views is entitled to less respect as laws of the United States. Cf., NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 65-67 (1964).

E. The Statute as Enacted Is Not a Substantial Departure From the Past and Is Not Without Precedent in the Public Assistance Titles.

Much of Respondent's argument focuses on the supposed revolutionary character of the requirements of 402(a)(23) and the lack of outcry to this fundamental alteration in the federal-state relationship. The argument falls with its

premise. Although §402(a) (23) is a self-evident departure from the past in dealing directly with state need standards and maximums, it does so in a manner reflecting much of the established congressional pattern. By utilizing each state's own standard of need, however inadequate that may have been, the statute continues to afford recognition to the variations in conditions among the several states. The same is seen in the acceptance of differentials between the standard of need and the amount of aid paid for those states then imposing maximums. In accepting these, Congress was also continuing the tradition of assuming greater federal responsibility for those states with lesser wealth and lower benefits.

Federal grant in aid requirements recognizing these differences and compelling maintenance of effort are not new to the federal-state relationship or the cooperative federalism embodied in that relationship. This is precisely the approach utilized by Congress but two years earlier in establishing conditions for participation in Medicaid, a federal grant in aid program identical in structure and operation to AFDC.⁵¹ Section 1902(c) of the Act provided that no state may continue to participate in Medicaid if "the approval and operation of the plan will result in a reduction of aid or assistance . . . provided for eligible individuals under [the categorical assistance titles of the Social Security Act]." 42 U.S.C. §1396a(c).⁵² That pro-

⁸¹ Social Security Act Amendments of 1965, 42 U.S.C. §§1395-1396(g).

^{\$2} On August 9, 1969, Pub. L. 91-56 was signed, amending §1902(c) to read "aid or assistance in the form of money payments" [emphasis added]. The purpose of this amendment was to make absolutely clear the intent of Section 1902(c). "The intention . . . was to prohibit the States from reducing cash payments

gram also requires that each state demonstrate "efforts in the direction of broadening the scope of grants and services made available." 42 U.S.C. §1396(e).

Thus even though New York provided a comparatively higher level of welfare assistance and supporting health services than Mississippi, while receiving less federal matching, Congress has determined that neither state may divert funds from public assistance to the Medicaid program and that both states, from quite different starting points, must establish an expansion of efforts. These requirements were not thought to work an alteration in the federal-state relationship. Indeed they were passed without controversy.⁸³

Again recognizing variations among the states, while asserting federal controls over expenditures, Congress also enacted in 1965 a "Maintenance of State Effort Provision," requiring each state to increase its public assistance expenditures in the quarters beginning June 1966 (through July 1969) to the full extent that its federal appropriation had been increased over amounts afforded in a 1965 base period. It also barred states from reducing their expenditures from 1965 levels without loss of federal matching funds. Section 1117(a), 42 U.S.C. §1317(a), repealed effective July 1, 1968, Pub. L. 90-248, §221(d), 90th Cong., lst Sess. (Jan. 2, 1968).

to public assistance recipients at the time they adopted their Title XIX plans, and diverting the funds to pay for medical care." Representative Mills, 115 Cong. Rec. H 6203 (Daily ed., July 23, 1969).

Only one brief mention of the maintenance of effort provision was made, and that was by Representative Mills in summarizing all of the provisions of H.R. 6675 (embodying all of the 1965 amendments to the Act). 111 Cong. Rec. 7201 (1965).

The welfare reform of the new Administration, while working a major change in establishing a wholly federal family security program for all families in need, adopts just this approach in determining both the amount of supplementary aid in AFDC and overall welfare expenditures that the states must assume for 5 years under the new program. As a condition of continued participation in the adult categories and the receipt of other federal monies, each state from its own funds must supplement for AFDC families (but not others) the limited federal payment to the extent its levels of aid in effect July 1969 (as adjusted for compliance with the provisions of Title IV) exceed the federal grant of \$1600 for a family of four. States with July 1969 levels below the federal allotment need not supplement. Similarly all states must continue to expend at least 50% and up to 90% of their current welfare expenditures. New York's obligation continues to be far greater than Mississippi's. Here too we find a federally required maintenance of state effort determined by variations in wealth and levels of aid among the several states. 402(a) (23) is not alien to this scheme of cooperative federalism. There is no major reallocation of power or responsibility in our federal system or an infringement upon a historically sacrosanct area of state autonomy. Compare Apex Hosiery Co. v. Leader, 310 U.S. 469, 513-14 (1940).

We may now place in perspective New York's "equity" argument. Congress was unmistakably aware of the existing disparities in AFDC aid among the states. These differences have been and continue to be inevitable in our federal system and therefore acceptable. Once again recognized in 1967, these differences accounted for the rejection of the Administration's proposed full need require-

ment and were thus determinative of the scope of 402(a) (23). There is no legal significance in the fact that 402 (a) (23) allows Mississippi to spend less on welfare than New York.

As enacted, Section 402(a)(23) is not an answer to our national welfare problems, including the inadequacy of AFDC aid in all states and the gross disparities in levels of aid among the states.84 Congress often deals with such large and fairly intractable problems by postponing a solution to them. 402(a)(23) does not address itself to questions of this magnitude. It is far less ambitious than the Administration's original proposal, and, as we develop later, infra at 101-02, leaves the states with the traditional and considerable flexibility to determine the amount of their overall resources to be devoted to AFDC. Cf. King v. Smith, supra. But that is not to say the section works no change because it leaves many problems unsolved. Viewed against its background and the concerns before Congress, the provision primarily represents an interim response, a holding action so to speak, in regard to one aspect of these national welfare problems. By stabilizing grant levels in all states as measured by its efforts during a past period, it prevents state cutbacks in payment levels which were

*Senator Kuchel noted that "Despite many improvements in the Social Security Law, all inequities have not been removed, nor have all necessary improvements been made." 113 Cong. Rec. 33632 (1967).

Indeed, on the day President Johnson signed the Social Security Amendments of 1967 into law, he appointed a special commission to undertake a study of adequacy of aid under the public assistance programs and other alternatives. Commission on Income Maintenance (Heineman Commission) appointed by President Johnson, January, 1968, Economic Report of the President and Annual Report of the Council of Economic Advisors, January 1969, at 23, 164-172.

known to be disturbingly low. Its proponents, along with the Congress, were also aware of the rising AFDC caseloads in many states and the threat that that posed to levels of aid. As with any maintenance-of-effort provision the section fixes upon an existing situation, which may be unsatisfactory, and operates as a floor, seemingly ad infinitum, against diminished state efforts through cutbacks in aid. It plainly was not expected to last forever but rather contemplates more basic change in the future. These more fundamental changes have now been formulated and they too leave some of the problems cited by New York unsolved. They also rely on the level of a state's efforts during a base period, July 1969, as adjusted for compliance with 402(a)(23).85

F. While Creating an Irreconcilable Exception to the Statute, the Recent Regulation of the Department of Health, Education and Welfare Confirms that the Statute Requires a Repricing of the Standard of Need and Maximums in Force During the January 1968 Base Period.

The current position of the Department of Health, Education and Welfare on 402(a)(23) is before this Court in the

⁸⁸ Section 101 of H.R. 14173, 91st Cong., 1st Sess., the Administration's proposed Family Assistance Act of 1969, would add a new Section 452(a) to the Social Security Act providing that:

[&]quot;Eligibility for and amount of supplementary payments under the agreement with any State under this part shall . . . be determined by . . . application of the standard for determining need under the plan of such State as in effect for July 1969 and complying with the requirements for approval under Part A as in effect on such date (but subject to such maximums and percentage reductions as were imposed under such plan on the amount of aid paid and, then, with the resulting amount of the supplementary payment to any individual further reduced by the family assistance benefit payable under Part D with respect to him)."

form of a regulation of and briefs filed by H.E.W. as amicus curiae in Lampton v. Bonin, supra, and Jefferson v. Hackney, — F. Supp. —, Civ. No. 3-3012-E (N.D. Tex. 1969), which are reprinted in the Appendix to this brief. H.E.W.'s recent position, concededly representing the irreducible minimum consistent with a respect for the language, recognizes that 402(a)(23) is a specific federal limitation on the power of the states to alter their 1968 need standards or maximums. Agreeing that the statute operates upon standards of need and maximums in force during the January 1968 base period, the federal agency reads the statute to require in all states a repricing of the standard of need and to forbid elimination of the component items from that standard to offset the adjustment.

"... In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard." 45 C.F.R. §233.30(a)(2)(ii), 34 Fed. Reg. 1394 (1969).

^{**}The regulation was promulgated on January 29, 1969, to "... now make it clear that while States must update their standards, if the States do not have the money to pay according to such standards they may make a ratable reduction." 34 Fed. Reg. 1394 (1969).

It reads:

[&]quot;In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a) (2) (ii), 34 F.R. 1394 (1969).

H.E.W. also confirms, as it must, that this adjustment is thereupon fully reflected in the amounts of aid paid in states meeting need in full in January 1968. H.E.W. Lampton Brief A-19. Further, states with maximums expressed in dollar amounts in the base period must adjust these amounts too in order to pass on the cost of living increase. Backsliding or avoidance in the form of imposing or reducing dollar maximums or reducing the need standard is not allowed. These propositions are sufficient to dispose of the instant case. New York may not under H.E.W.'s view eliminate items from its January 1968 standard of need, reduce yet other amounts, or create a dollar maximum to avoid the required maintenance of effort. New York has no system of percentage factors.

But the court below was influenced by H.E.W.'s assertion that the statute does not address itself to a mechanism by which a state may nullify the undertaking and we shall accordingly deal with this argument. Purporting to be relying on the canon of literal or plain meaning, H.E.W. argues that the statute does not require an adjustment to percentage factors (i.e., 50% of need) since that would result in a disproportionate increase in aid.* Therefore

^{at} The H.E.W. argument is as follows;

[&]quot;If, however, a State had no maximums, but used percentage reductions, no change in the percentage reduction is required or precluded. If the State previously had a standard of need of \$100, and paid 80% of need, the recipient would receive \$80 per month. If the need standard were now raised to \$120 to reflect a rise in living costs, and the State continued to pay 80% of need, the recipient would receive \$96. The rise in living costs would be thus passed on to the recipient if the percentage reduction remained unchanged. It seems obvious that section 402(a)(23) does not require that a percentage reduction be 'proportionately adjusted.' If the percentage paid by the State also had to be raised by the rise in living costs, in the example above, the State's need standard

ratable percentage reductions are not maximums, the statute does not operate upon them, and the states are free to do whatever they will with them. Since some states in 1967, albeit a distinct few, paid less than full need through the imposition of percentage factors, Congress sculpted an exception from the operation of §402(a)(23) for this mechanism.**

Even as an exercise in literalism, the distinction between dollar maximums and percentage factors applied to the standard of need (or budgetary deficit) cannot withstand analysis. To return to the statute, it states that "any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted." By definition a maximum in this context is a ceiling on the amount of aid paid, providing an amount that is less than the standard of need. The standard of need is a monetary amount, so too are "any maximums," lest we deal with apples and pears. A maximum literally means the "greatest quality or value attainable" or "an upper limit allowed by law or other authority." A percentage factor is a method of deriving this monetary ceiling, as would be a

would be raised by 20% to \$120 and the State would pay 96% of need (instead of 80%), resulting in a payment of \$115 (instead of \$80), a rise more than double the 20% rise in living costs. In some States, such an adjustment in the percentage reduction could require payment of more than 100% of need." H.E.W. Lampton Brief A-19, A-20.

MAS H.E.W. puts it,

[&]quot;In short, it appears that §402(a)(23) just does not refer to percentage reductions. It does not require that they be adjusted, or that they remain the same, nor does it preclude changes in their amount." H.E.W. Lampton Brief A-20.

Webster's Third New International Dictionary of the English Language, p. 1396 (1961).

fraction, ratio and so on. Aid to families is not afforded in percentages or fractions; it is, after all, money. Of course the statute does not require an adjustment to the percentage factor. It requires that "any maximums . . . on the amount of aid paid to families will have been proportionately adjusted." The maximum amount of aid paid under a percentage system "will have been adjusted" upon the required repricing of the need standard, so long as the percentage factor is kept constant. To illustrate, assume that the standard of need is \$100 of which a state pays 50% (\$50) and the cost of living factor is 10%; after the adjustment of the need standard, the maximum imposed on the amount of aid is \$55.00. That maximum has been proportionately adjusted and the terms of the statute indeed make sense in respect to the operation of percentage factors. Although H.E.W. concedes that there has "been confusion about the two methods" and "that the term maximum has been used to refer to both methods." H.E.W. Lampton Brief A-23, its clear understanding of the distinction between the two is not reflected in any statute of Congress or any regulation thereunder until after the enactment of 402(a)(23).

Significantly the distinction is also not reflected in the legislative evolution of 402(a)(23). The Administration's proposal to require payment of need in full concededly covered all states then utilizing dollar maximums, percentage factors, or both, as is often the case. Indeed, the Administration submitted with its proposal two charts, one expressing the record of the 33 states utilizing one or more of these mechanisms as a percentage of their need standard, the other expressing in dollar figures the "highest

so See note 30, supra.

menthly amounts payable for basic needs," including those "amounts resulting from the application of a percentage or flat reduction to the amount of determined need." *1 This interchangeable use of percentage or dollar denotations makes manifest that we are dealing with modes of expression for descriptive purposes and not some meaningful distinction between mechanisms for paying less than state-recognized need.

The Administration assuredly did not distinguish between them in explaining the necessity for requiring payment of fall need. The Senate Committee acted on this record in specifically substituting a required adjustment of "any maximums" for the meeting need in full proposal. This substitution plainly was intended to require a proportionate living cost adjustment in those 33 states then not meeting need in full, and not an adjustment fortuitously excluding 11 of those states then using percentage factors. Neither dollar maximums nor percentage factors were particularly new in 1967. At no time did H.E.W., or anyone else, suggest that percentage factors were excluded from the provision, though their asserted omission totally nullifies the exercise. The Committee analysis of the provision, and the companion provision for the adult increase through adjustment of "any maximums," contains no such distinction. Are we to assume that Congress carved out an exception in the adult provision also by failing to specify percentage factors in requiring an adjustment of "any maximums" 1 92 The expressed concern of the proponents of 402

M Analysis of H.R. 5710, p. 37.

⁹⁹ Judge Hays finds weighty significance in variations in the language used in the Conference Report in explaining the Senate Committee's proposal for an increase in the Adult programs and

(a) (23), along with the adult provision, was with "Increasing Income Of Recipients," not in playing a cipher game, with a year and a half in which to play it. Congress in 1967 well understood that maximums referred to amounts

the AFDC provision. In regard to the Adult provisions, the Conference Committee read the Senate Amendment

"to require each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable under its plans... so that the total aid or assistance and other income per recipient will be no less than \$7.50 per month above the total aid or assistance and other income per recipient under the standards and maximums applicable on December 31, 1966...."

The Committee read the Senate's AFDC provision to require that

". . . by July 1, 1969, and annually thereafter, each State (under its plan for AFDC approved under Title IV) must adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid." Conf. Rep. No. 1030, pp. 62-63.

It is unlikely that the minor difference in language was intended to reflect a difference in the substance of the two provisions. If a technical difference was perceived, however, the additional language describing the Adult provision was undoubtedly intended to close up a possible loophole by preventing the states from usurping the Social Security increases through adjusting downward their exempt income standards. Such standards, by defining exempt income, do determine the extent of supplementary aid or assistance the States provide. The central purpose of the Adult proposal was to pass along the increase in Social Security benefits to the adults who receive supplementary aid or assistance under the Adult titles. See Summary of Social Security Amendments of 1967, Joint Publication, Senate and House Committees, 90th Cong., 1st Sess. at 19, describing this provision as "Pass Along." See note 58, supra. The AFDC provision was not inspired by this consideration, since few AFDC families receive Social Security. Until the federally-required income exemptions in the 1967 amendments, few states provided standards for exempting income of AFDC families. Hence, the AFDC provision, unlike the Adult proposal, was not concerned with a state income standard for determining "the extent of its aid or assistance."

of aid, and not to the methods by which such amounts are derived. Indeed, the only congressional use of the term maximum is in reference to the federal dollar ceiling on participation, which significantly is derived through the application of a fraction and a percentage factor.³³

Under H.E.W.'s view the statute requires a great deal during the considerable period afforded for compliancea cost of living study; adjustment of need standards, which must be left intact; adjustment of dollar maximums, which may not be reduced—and rather nothing at all: the states may set any level of payments whatsoever, the identical position they were in before 402(a)(23). Recognizing that legislation has an aim, seeks to obviate some evil, or effect some change in policy, Uptagrafft v. United States, 315 F. 2d 200, 204 (4th Cir.), cert. denied, 375 U.S. 818 (1963), and that it is not easy to suppose "any part of a statute to be without meaning," General Motors Acceptance Corp. v. Whisnant, 387 F. 2d 774, 778 (5th Cir. 1968); see, e.g., Platt v. Union Pac. R.R. Co., 99 U. S. (9 Otto) 48, 58 (1878), H.E.W. seeks support in other "significant effects" for this federal enactment." There are effects to this exercise, but hardly ones that the proponents or assumed opponents in Congress could conceivably have desired. They reveal the bankruptcy of this position.

First, it is said, that "if the need standard is raised to reflect higher living costs, additional individuals become eligible for ADC... more individuals with income will now be eligible." H.E.W. Lampton Brief A-21. This is a

^{** 42} U.S.C. §603(a)(1).

⁴ H.E.W. Lampton Brief A-21.

non sequitur, as H.E.W. recognized in defending "compliance" in the State of Texas, which faithfully adhered to the H.E.W. regulation. In changing over from a system of dollar individual and family maximums to a percentage factor applied to the standard of need, approximately 2,500 families were eliminated from the AFDC rolls in that State, and H.E.W. eliminated this argument from its brief in Jefferson, A-39. As H.E.W. accepts in the Texas case, no federal law or regulation prohibits use of the budgetary deficit, after application of the percentage factor to the standard of need, to determine eligibility for aid.96 Moreover, a required increase in the AFDC rolls was the one thing that the Congress did not specifically intend in 1967. The federal freeze, the work program, income exemptions limited to persons actually receiving AFDC, 96 and not other eligible individuals. or were conceived as weapons to deal with the steady rise in AFDC rolls. The freeze in particular was intended to coerce the states to deal with the growth in the number of children in the absent parent category. so Indeed, the proponents of 402(a)(23) conceived of

^{**} Eligibility for services with federal matching depends, of course, on eligibility for financial aid. 45 C.F.R. §220.61.

^{96 42} U.S.C. §602(a)(8)(A).

^{97 42} U.S.C. §602(a)(8)(D); See also 42 U.S.C. §608(a)(C)(i), (ii).

Puring the initial consideration of H.R. 12080 by the House, Representative Mills reported on the floor of the House that the freeze "would give the States an additional incentive to make effective use of the constructive programs which the bill would establish." 113 Cong. Rec. 23055 (1967). When the Conference bill was being debated, Representative Mills was more blunt in defending the "freeze."

[&]quot;It is there to get the States to act on the other provisions of the bill requiring them to do something to reduce depen-

it as a weapon to reduce dependency by restoring capacity for self-sufficiency through more adequate grants. They certainly did not look to see yet further reductions in prevailing levels of aid by increasing the total number of eligible persons. The stress on a variety of social and rehabilitative services was not to invite people to join the AFDC rolls, but to get them off.

"In addition," H.E.W. states, "the updating of the need standards will make the standards more realistic in light of current conditions. This will give important information about the needs of assistance recipients to State agencies, State legislators and officials and the public." H.E.W. Lampton Brief A-21. But 402(a)(23) is a curiously unwieldy device to convey the not too obscure fact that living costs are rising. As H.E.W. recognizes "to make adequate assistance payments, a state will use a standard which includes all items needed by the recipients, priced at current levels in accordance with some recognized low income budget." H.E.W. Lampton Brief A-16. Accepting the state's standard with whatever items and prices it had in January 1968, §402(a)(23) sheds no information on these elements.

Finally it is argued that

"To the extent that states with inadequate funding of their public assistance programs turn to percentage reductions rather than maximums, there will be a more

dency and to take people off welfare who should not be there. It is as simple as that. We passed legislation in 1962 designed to take persons off the welfare rolls but the results obtained within the States have been less than startling. Now we are furnishing a prod to obtain some results from the State welfare agencies." Id., at 36368.

equitable system of distributing the funds, without the arbitrariness of maximums

"While maximums often result from insufficient funds, they have an independent arbitrary aspect which may limit payments even where funds are otherwise adequate." H.E.W. Lampton Brief A-21, A-32.

This argument is founded on several unsupportable premises. First, it proceeds on the assumption that states may not make ratable percentage reductions on the adjusted dollar maximums, individual or family. Why not? After all the essence of H.E.W.'s position is that 402(a)(23) allows free play to the use of percentage factors and their application to the adjusted need standard nullifies the required adjustments quite as much as their application to any adjusted dollar maximums. Nothing in 402(a)(23), as read by H.E.W., prohibits this result.

Moreover, there is nothing inherently more arbitrary about an individual dollar maximum than a percentage factor applied to the standard of need or budgetary deficit. The arbitrariness, in the sense of inadequacy or failure to meet recognized needs, inheres in the amount of aid, not the method of determining such amount. And both devices continue to limit aid below that of need even where funds are otherwise adequate.

To the extent that states do turn to percentage factors applied to the budgetary deficit (i.e., need less income) in order to maintain or decrease their 1968 level of expenditures, there is a redistribution of the same or less welfare resources among a larger number of families. Those with incomes above the level in the previous individual maxi-

mums now receive some aid; those with no income, the substantial majority of AFDC recipients, receive less aid than before. Surely, Congress was not seeking a major redistribution of welfare resources at the expense of needy families at the very bottom of the income scale.

Unlike individual maximums, family maximums do bear a distinct element of arbitrariness insofar as they deny aid entirely to additional members of the family over a specified size. See Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969), prob. juris. noted, 38 U.S.L.W. 3115 (October 13, 1969), Dews v. Henry, 297 F. Supp. 587 (D. Ariz. 1969), Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969). But Section 402(a)(23) itself certainly does not forbid their use by requiring an adjustment to them, cf., Williams v. Dandridge, 297 F. Supp. at 454, and ratable percentage factors in no way discourage their use. Operating as an additional ceiling on the amount of aid to be paid. such maximums are often used now in conjunction with percentage factors. A modest cost of living adjustment to a family maximum does not diminish their utility in reducing state expenditures. Nor does such an adjustment affect their distinct element of arbitrariness in denying aid to additional children in a family." There is nothing in the

Embroidering on the H.E.W. position, Judge Hays finds adjustment of a family maximum the sum total of the intended effect of 402(a) (23). Support for this view is found in the recent litigation challenging the arbitrariness of family maximums on constitutional grounds and the use of the word "family" in reference to any maximums on the amount of aid paid to families. Why Congress dealt with constitutional attacks on family maximums, then just beginning, by requiring an adjustment that does not alter the constitutional issue is not clear. But it is clear that aid under Title IV, entitled Aid to Families with Dependent Children, is money payments to families with dependent children. Section 402(a) of the Act, 42 U.S.C. §602(a)(1) was amended in

legislative history to support the notion that Congress was focusing on family maximums rather than on states that paid less than full need. The H.E.W. interpretation cannot be reconciled with the language or any conceivable purpose behind the enactment. It is therefore wanting.

G. New York's Elimination and Reduction of Base Period Amounts Used to Determine Needs to Accommodate Its 1969 Welfare Cuts Violates 402(a)(23).

The District Judge's finding of fact that §131 enacts "drastic cuts in both the standard of need and level of payments to meet the exigencies of a state budget" (209) is amply supported by the record, including the evidence submitted by New York. These findings were not disturbed on appeal; indeed New York raised no additional argument in respect to the summary judgment. Judge Feinberg, upon re-examination, affirmed this finding, stating:

"No amount of linguistic acrobatics or technical rationalizations can disguise the glaring fact that the state is critically reducing AFDC standard of need and payments" (251).

But since New York has heretofore urged a battery of confusing arguments to becloud this fact, we shall deal with them again.

We do not dispute that 131-a is based upon the previous standard of need. It is the transformation of that base

¹⁹⁶² by Pub. L. 87-543, §104(a)(2) to substitute "aid and services to needy families with children" for "aid to the dependent children" in the catch line. See also 42 U.S.C. §§606(b), 607(b)(1), 608(b).

period standard through reduction of amounts and elimination of items to accommodate the desired 13 percent slash in AFDC expenditures that offends the requirements of 402(a)(23).

Section 131-a transforms the standard of assistance in force on January 1968, as repriced in May, 1968, as follows:

- 1. The amounts used to determine needs of individuals in January 1968 were differentiated ones based upon the size of family and the age of the oldest child, with particularly greater step increases in amounts for teenage children (and adults) in recognition of their greater personal requirements for food, clothing, educational and social necessities. These are now eliminated in 131-a, and all families are brought down to the previous level of the mean-age category for families of that size, thereby abolishing for most families with older children (save those with seven or eight persons) the significantly larger step increases for teenage children. Some families with children below the mean age obtain modest increases under this redistribution, while AFDC families with children above or at the mean age receive an immodest decrease.
- 2. The flat cyclical grant providing each recipient in New York City, regardless of age, with \$100 annually (\$8.33 per month) for items of clothing and home furnishings is eliminated.
- 3. The corresponding amounts for clothing and home furnishings outside New York City, afforded upon the

¹⁰⁰ See 18 N.Y.C.R.R. §352.4, repealed.

¹⁶¹ The amounts for the mean age category are then slightly reduced to maintain constant intervals and no additional provision is made for families with older children.

occasions of need rather than in a flat amount quarterly, are abolished; no amount is added to the standardized grant for these items.

- 4. With the exception of rent and fuel, all of the amounts administered as critical supplements to the bi-weekly grant for expenses incidental to maternity and infancy, medically-necessitated diets and telephones, relocation, school lunch allowances, travel expenses for employment or medical reasons, including visits to children in hospitals and institutions, and others are eliminated; no amount is added to the standardized grant for these needs.¹⁰²
- 5. The annual May repricing of the need standard is by-passed in this year of spiraling inflation; the Administrator is merely to report to the Legislature in 1970 the changes in living costs since 1968. N.Y. Soc. Serv. Law §131-a(5). The above four changes adversely affect all AFDC families in the state, regardless of family composition.¹⁰⁸

In Louisiana, for example, favored treatment was recently afforded recipients of Old Age Assistance; administrative reduction of their grants was prohibited without prior legislative approval. Discrimination against AFDC recipients was evidenced by an ad-

¹⁰² See 18 N.Y.C.R.R. §352.4.

the elimination of supplements, and perhaps in response to political pressures, the Respondent recently instituted a "special necessity grant" of \$8.00 per month for individual recipients or \$5.00 per month for a recipient living with his family, in the adult categories of aid, despite the embracing language of Section 131-a ("these amounts shall be deemed to make adequate provision for all items of need . . exclusive of shelter and fuel.") New York Times, September 24, 1969, p. 1, col. 7. AFDC children, with their greater numbers and lesser political influence, were wholly denied the benefit of this recognition. Such discriminatory treatment of AFDC children is not unusual, in New York and elsewhere.

That Section 131-a serves its purpose is seen not only in the reduced AFDC budget but in its impact on the Petitioners before this Court. Appellee Duffy's monthly family grant is reduced \$174.40 under the new law; the family of Catherine Folk receives \$129.00 less a month. Sophia Brom, a diabetic, and Marjorie Miley, who has tuberculosis, are denied entirely amounts for medically-necessitated special diets and telephones. The overall effect on Petitioners is shown in the table below.¹⁰⁴

ministrative reduction confined to the AFDC program subsequent to this legislation. See Lampton v. Bonin, supra. The influence of welfare recipients apparently varies as the "public image of the character of the recipients" changes from "respectable, aged, white literate citizen in his 'golden years'" to "an uneducated, unmarried Negro mother and her offspring." Steiner, Social Insecurity: The Politics of Welfare 3 (1966).

Plaintiff	Previous Grant	Maximum Under 131-a
Rosado	\$280	\$254
Hernandez	\$218	\$162
Miley	\$535	\$469
Abrom	\$406	\$340
Gathers	*382	\$340
Lowman	\$396	\$383
King	*482	\$426
Folk	\$337	\$208
Phillips	*314.40	\$224
Duffy	\$563.40	\$389

The New York Times reported that:

"Slowly, a kind of alarm appears to be building among the first of those expected to suffer reductions under the sharply revised system of relief. . . . A blind man on the East Side has seen his daily-needs budget cut by more than half, including the elimination of 24 cents a day to feed his guide dog.

A crippled polio victim in Harlem whose previous \$191-a-month allotment has been cut by \$60, has missed physician's appointments because his car fare grant was eliminated. . . .

A welfare mother who has worked for almost two years, has earned a high school diploma and hopes for a career as a social

The multitude of sundry defenses Respondent tendered below cannot withstand analysis. The broad argument that 402(a)(23) does not apply to New York since that state pays "the highest level of benefits per AFDC recipient" ignores the import of 402(a)(23) and is accordingly addressed to the wrong forum. Cf., Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968) aff'd 393 U.S. 323 (1969). It is precisely the argument that Congress did not accept in 1967 when it enacted §402(a)(23) without the payment of full need requirement.

The second defense, offered below, that 402(a)(23) "expires July 1, 1969, which is coincidentally the effective date of New York's 131-a," warrants little discussion. Since the federal provision requires that the adjustments "will have been" effectuated by July 1, 1969, it is plain that the repriced schedules are commanded to be in force on and after July 1, 1969. Plainly 402(a)(23) does not require adjustments before July 1, and these required adjustments are not an exercise in futility. See Lampton v. Bonin, 299 F. Supp. 336 (E.D. La. 1969); H.E.W. Lampton Brief A-11.

New York then argues, and Judge Hays appears to agree, that 402(a)(23) requires no increase in aid paid to families in states without any maxima, such as New York. In those states the statute only requires an adjustment to the standard of need, which, it is said, merely determines

worker has suffered a cut of \$140 a month, mainly in fees for the baby-sitter who tends her five children and one grandchild. 'This is insane,' said the welfare mother, Corrine Greene. 'I'm trying to make a career and get off welfare and those legislators are doing everything they can to keep me on.'" New York Times, July 26, 1969, p. 27, col. 4.

¹⁰³ See note 52, supra.

eligibility for aid but not the amount of aid. That is simply untrue. In states without any maxima, the standard of need (the amounts used to determine the needs of individuals) is the sole determinant of the amount of aid to be paid. Repricing the need standard under 402(a)(23) perforce results in the required adjustment in the amount of aid paid. Congress went on to require the proportionate adjustment to maximums to insure that the repricing increase would be passed on to recipients in states then paying less than full need. It certainly was not intended to exempt states paying full need from the requirements of the statute. In light of these two requirements, both the creation and reduction of any dollar maxima are equal violations of 402(a)(23). 45 C.F.R. \$233.20(a)(2)(ii); H.E.W. Lampton Brief A-32; H.E.W. Jefferson Brief A-43, A-44.

Respondent also asserted that 402(a) (23) does not apply to certain components of the standard of need existing on July 2, specifically those eliminated by Section 131-a. The contention seems to be that these items were not part of the AFDC standard of need in force in January 1968, but rather were in excess of New York's standard and therefore "totally gratuitous." That assertion is plainly belied by the operation of the New York plan, federal regulations and the character of the items now eliminated or reduced. New York's definition of its own standard of need prior to 131-a quite plainly covered all these items:

"An individual or family shall be deemed 'in need' when a budget deficit exists or when the budget surplus is inadequate to meet one or more nonbudgeted special needs required by the case circumstances and included in the standards of assistance." 18 NYCRR §353.1(c). See also 18 NYCRR §353.1(d). ("All items of basic

maintenance and all items of special need required by case circumstances" comprise the recipients' "estimate of regular recurring need.")

Monetary amounts were assigned to these items and the conditions for their issuance were spelled out in New York's regulations as a part of its federal AFDC plan, pursuant to the federal requirement that

"If the state agency includes special need items in the standard (a) describe those that will be recognized, and the circumstances under which they will be included and (b) provide that they will be considered in the need determination for all applicants and recipients requiring them." 45 C.F.R. §233.20(a)(2)(v), 34 Fed. Reg. 1394 (1969).

Significantly, New York claimed and received federal matching funds for all the substantial amounts expended in meeting these needs. Such federal participation is available only where the "income of a needy individual, together with the assistance payment, do not exceed the state's defined standard of assistance." 45 C.F.R. §233.20(3) (vii), 34 Fed. Reg. 1394 (1969) (emphasis added). See also H.E.W. Handbook, Pt. IV., §3120(2). Pursuant to the federal hearing requirement for "any individual whose claim for aid to families with dependent children is denied," 42 U.S.C. \$602(a)(4), New York systematically afforded such hearings when special grants were reduced or denied and of course when the age differentials were not met. When New York sought to administer amounts for clothing and home furnishings as a flat quarterly grant in New York City, it sought and obtained from H.E.W. a special exemption from the federal requirement that the standard of need must be uniformly administered throughout the state. ¹⁰⁸ Indeed the Congress endorsed the use of special need supplements in providing an averaging formula for federal matching, 42 U.S.C. §603(a), specifically to "enable the states, with federal participation, to meet more adequately the unusual needs of individuals." ¹⁰⁷ 1958 U.S. Code Cong. & Admin. News p. 4260.

As established in the uncontroverted evidence in this case, special grants in New York, and the greater amounts for older children were not luxuries. The greater requirements of older children for food, clothing and education are simply

Both New York and H.E.W. have specifically recognized special grants as part of New York's AFDC standard of need. When New York recently desired to administer grants for clothing and home furnishings as a flat cyclical grant rather than as a special grant in New York City, it sought and obtained a waiver from H.E.W. under 42 U.S.C. §1315 of the federal AFDC requirement that the state standard of need must be uniformly administered throughout the state. H.E.W. approved the "demonstration project" because grants for articles of clothing and home furnishings were retained in New York's AFDC standard of need, but simply administered on a different basis in New York City. Were these items not part of the AFDC standard of need, but, as New York now claims for these very items, "totally gratuitous on the part of the State," this proceeding under the Social Security Act would have been wholly inappropriate, indeed improper.

¹⁶⁷ H.E.W. Secretary Marion Folsom testified before the Committee on Ways and Means as follows:

[&]quot;States would have much more flexibility to provide payments more in line with wide variations in individual need. [The] matching limit might be more readily recognized for what it should be: a means of regulating the total federal share, rather than a suggestion of what should be the ceilings for individual cases."

House Committee on Ways and Means, Hearings on All Titles of the Social Security Act, 85th Cong., 2nd Sess. (1958), p. 6.

facts of subsistence life, as reflected in all low income budgets, including the Government's low-cost food plan on which New York places such heavy reliance. Nor are these amounts, based on two-year step intervals, windfalls for other children in the family. Special or supplemental grants are merely a different method for meeting basic needs of children and their parent, as illustrated by the very items then administered as special grants of and the reasons for such administration.

Fine differentiations are inherent in the barren field of welfare budgets, as Congress has recognized. Where certain personal requirements, as basic as any other, are thought not to be universal or constant, New York (with other states) tailored the payment to the specific occasion and amount of need, as indeed it still does for rent, fuel and homemaker service. 110 Supplements are so administered to avoid any possibility of "excess" or flexibility in the spartan welfare grant. To be sure, special grants were only given when necessity was shown, but a showing of need is the fundamental condition for any grant under AFDC. What New York is really saying is that it no longer will recognize and provide for needs that were met in January 1968, and the reasons have nothing at all to do with a determination that these needs no longer exist. Were it

¹⁰⁸ The amount set forth for expensive staples, i.e., meat, fruit, vegetables, is three times greater for teenage children than for younger children. U.S. Bureau of Labor Statistics, 3 Standards of Living for an Urban Family of Four Persons, Bull. No. 1570-5 (March, 1969).

¹⁰⁰ See supra at 12-13, notes 4-11.

¹¹⁶ 18 NYCRR §§352.4(a)(5), (6), 352.5(b). In providing for rent and fuel, the Department must determine in each case that the premises are suitable and that the amount is within Department limits.

deems necessary, the rest being "gratuitous," the federal maintenance of effort requirement would be emasculated. New York's determination does not depend on whether the need was met by a regular or supplemental grant (New York applies the same reasoning to both here), or on whether the need exists, but plainly rests upon the intent to reduce AFDC grants. This is precisely what 402(a)(23) forbids.

New York's incantations of administrative efficiency and equity among recipients are specious and irrelevant. Diets or telephones for diabetics or cardiac victims, transportation for persons searching for employment or visiting hosnitalized children, school lunches for welfare children, expenses for infancy, did not lead to a "wide disparity . . . in favor of the more aggressive or sophisticated welfare recipients." Respondent's Brief in Opposition to Petition for Certiorari, p. 13. The only conceivable components involving broad caseworker discretion or frequent necessity were clothing and home furnishings, and these were administered as a flat cyclical grant in New York City, now eliminated in 131-a. There is no administrative efficiency (save for cost per se) in elimination of objectively verifiable needs (pregnancy, childbirth, and so on), elimination of the twoyear age differentials (countless adjustments in the grant are required yearly, including recertification every three months, see Kelly v. Wyman, 294 F. Supp. 887 (S.D.N.Y. 1968) prob. juris. noted sub nom. Goldberg v. Kelly, 37 U.S.L.W. 3399 (April 21, 1969),111 or the elimination of the

^{111 18} NYCRR §351.23.

"flat" grant in New York City,112 where 80% of AFDC children reside.

But more fundamentally, 402(a) (23) has little to do with the manner of administering a grant and does not impose an administrative straitjacket. As the H.E.W. regulation under 402(a) (23) recognizes, a state may consolidate its standard to simplify administration, but such "consolidation . . . (i.e., combining of items) may not result in a reduction in the content of the standard." New York has not consolidated its standard of need; it has eliminated the needs formerly met with supplements, while adding nothing to the regular grant to meet those needs. Similarly, it has reduced those amounts to meet the basic needs of older children. Section 131-a does not provide "flat" grants for any of these components of need, but rather no grant at all, and this constitutes the "enlightened" flat grant concept in New York. New York has severely reduced welfare

of Family Services in H.E.W. (Doc. No. 49), quoted at length below as authority for a federal mandate of simplification, is plainly not an expression of the viewpoint of H.E.W., no less a regulation of that agency. But that letter recognizes that the elimination of age differentials and assistance "for personal items [is difficult] because these costs vary by age of family members." The letter further states that the provision for special grants may be equitably eliminated only when "realistic money amounts in the standards of requirements for basic need" are provided. The letter further recognizes that no basic welfare allotment can be sufficiently adequate to justify the elimination of all non-universal and non-recurring items of need.

As Mitchell Ginsberg, now Commissioner of the New York City Human Resources Administration, testified below:

[&]quot;...a real flat grant system ... would be dependent on the fact that it [the recurrent grant] was substantially higher than what we have at the present ... I submit there can not be any meaningful discussion of welfare [the flat grant] without discussion of the level of the grant" (49, 50).

grants to meet the exigencies of a state budget in violation of an act of Congress.113

118 The argument that New York has not reduced rent is irrelevant, that being only one of the amounts used to determine the needs of individuals. Also irrelevant is its assertion that some families benefit as a result of the transformed need standard. Any overall reduction in welfare expenditures entails a change in the need standard, and, where used, maximums. Such changes often result in some families receiving modest increases and others receiving decreases. See, e.g., the discussion in Jefferson v. Hackney, supra, and Lampton v. Bonin, supra, of the effects of the Texas and Louisiana cutbacks respectively. Section 402(a)(23) is concerned with the maintenance and repricing of the amounts used to determine the needs of individuals, not with the redistribution of welfare resources. It plainly does not refer to some individuals and not others, though it also does not bar an increase, over and above its required maintenance of effort, for any individuals and families on AFDC. New York may seek whatever equity it wishes, without re-

ducing levels of aid in the process.

Similarly, New York may not satisfy the statute through providing "many items," "such as moving, homemaking, etc.," Respondent's Brief in Opposition, p. 13, on a purchase of services basis where there is a special need. While undercutting the tedious argument on the rationale for elimination of special grants, the "etc." is without meaning. There simply has not been restoration of the supplemental grants on a purchase of services through vendor payments to the supplier (156, 157). More fundamentally, Section 402(a) (23) deals with aid paid to families with dependent children. Under the federal AFDC statute, "aid to families with dependent children means money payments with respect to . . . a dependent child or dependent children." 42 U.S.C. §606(b). Purchase of services, with direct payment to vendors, does not comply with the federal requirements and H.E.W. regulations designed to protect the "amounts of aid paid" under the AFDC program. See H.E.W. Handbook, Pt. IV, §5120, et seq.; 45 C.F.R. §233.20(a)(ii), 34 Fed. Reg. 1394 (1969). A state may not claim federal reimbursement for the provision by vendor payments for purchase of services of "subsistence and other assistance items" normally included in the standard of need, unless there has been a finding in the individual case of mismanagement. Such payments, even with the finding, may not exceed ten percent of the families in each state receiving aid to dependent children. See, 42 U.S.C. §§606(b)(2)(A), (B), (E); 603(a)(5). See also §605. 45 C.F.R., Pts. 220 and 226, 34 Fed. Reg. 1394 (1969). Similarly, for these reasons, New York's proposed food stamp program, day care center program, work incentive program, are irrelevant to this case.

П.

Both pendent and independent bases of jurisdiction compelled prompt adjudication in the United States District Court of the validity of state action under paramount federal law.

Our opening statement sets forth the succession of events in the District Court. The proceedings there were complicated to be sure, but they culminated in a determination on the merits after a full and fair hearing of the issues. These issues, from the start of the case, were solely ones of federal law. When the equal protection claim was deemed moot, the remaining question was the meaning of a federal statute on a point of such enormous consequence to both Petitioners and Respondent that prompt disposition was recognized by both parties as absolutely essential. Nonetheless, the Court of Appeals held this federal issue not properly to be heard in federal court. Independent jurisdiction is lacking and pendent jurisdiction is abused.

That the federal courts have no independent jurisdiction to adjudicate a suit brought under 42 U.S.C. §1983 to vindicate federal statutory rights where the amount of federal funds in controversy is several hundred million dollars and where the harms about to be inflicted upon children asserting such rights are malnutrition, stunted growth and impaired educational performance, is a startling proposition. To say this is true is to state a major defect in the allocation of adjudicatory powers within our federal system, which is the function that federal jurisdiction-conferring provisions perform. But it is not true. In so holding, the court below erroneously rejected several independent jurisdictional bases for the statutory claim, 28 U.S.C. §§1331, 1343(3), and 1343(4).

Even more startling and novel is the court's holding in the circumstances of this case that it was an abuse of discretion for District Judge Weinstein to exercise pendent jurisdiction to vindicate these federal statutory rights once the constitutional claim had been deemed moot. We know of no other case in the federal annals of two centuries holding, or suggesting, that it might be an abuse of discretion to decide a purely federal claim based on a federal statute merely because jurisdiction is pendent rather than independent. Because the majority judges of the Circuit Court treated this point at length, we begin with it. Subsequently we show that independent bases of jurisdiction exist.

- A. The Federal District Court Had Jurisdiction to Decide the Social Security Act Claim, and Properly Did So.
 - The District Judge Had Power to Decide the Pendent Claim.

Guided by the liberal joinder provisions of the Federal Rules of Civil Procedure, this Court in United Mine Workers v. Gibbs, 383 U.S. 715 (1966) set forth considerably broadened standards of pendent jurisdiction. Under these standards, as no judge below doubted, the district court had jurisdiction to hear the concededly substantial constitutional issue, over which 28 U.S.C. §1343(3) clearly vests jurisdiction, and also had pendent jurisdiction over the Social Security Act claim; cf. King v. Smith, 392 U.S. 309 (1968). Both claims sought injunctive and declaratory relief against the very same schedule of grants set forth in §131-a, adopted March 31, 1969. Establishment of both claims rested on similar proof of the relationship between the revised and prior schedules and costs of living. Thus the claims "derive from a common nucleus of operative fact" and are "such that [plaintiffs] would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, supra, 383 U.S. at 725. Indeed, but for its determination of mootness, the three-judge court should properly have exercised that pendent jurisdiction to decide the statutory claim in preference to the constitutional claim, thereby avoiding unnecessary resolution of constitutional issues. King v. Smith, supra; Solman v. Shapiro, 300 F. Supp. 409 (D. Conn.), aff'd 38 U.S.L.W. 3125 (October 13, 1969).

The power of the district court to decide the pendent federal statutory claim did not expire when the constitutional claim which served to confer federal jurisdiction was deemed moot. As federal courts have power to decide pendent state law claims even after dismissal of the federal claim which conferred jurisdiction, Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), Hurn v. Ousler, 289 U.S. 238 (1933) (dictum), their power to decide pendent federal claims in similar circumstances is clear a fortion. United Mine Workers v. Gibbs, supra states that the question of power is to be decided on the pleadings, and if "plaintiffs claims are such that he would ordinarily be expected to try them all in one judicial proceeding . . . there is power in federal courts to hear the whole" 383 U.S. at 725.

After deciding the mootness of the constitutional claim, the three-judge court did not exercise its pendent jurisdiction over the statutory claim, stating per curiam:

¹¹⁸a There was nothing "curious" in the joinder of families from New York City and Nassau County. Both were aggrieved by the new statutory schedules and the equal protection relief sought for Plaintiffs from Nassau County in no way threatened any further reduction in grant levels for New York City. The Respondent Commissioner was barred by statute from reducing the legislative schedules for New York City, N.Y. Soc. Serv. Law §131-a.

"We need not consider the now academic question of whether the three-judge court might, in the exercise of its pendent jurisdiction, have decided the alleged statutory issue either before it considered the alleged constitutional issue or after it decided the constitutional issue against the plaintiffs. Cf. King v. Smith, 392 U.S. 309, 312 n. 3 (1968). Under the circumstances of this case there is no reason for continuing the three-judge court" (135).

However, the case was referred back to Judge Weinstein "for such further proceedings as are appropriate" (135). Plainly the terms of remand cannot be received as a three-judge determination that pendent jurisdiction should not be exercised by the single judge. No more pressing issue existed in the case, and this choice of language, subscribed to by Judge Weinstein, is patently designed to bypass that issue by leaving it to the discretion of the regular single-judge district court.

Following the remand, the District Judge had power to decide the remaining claim, regardless of whether an independent jurisdictional basis for it existed at that point.

We therefore disagree with Judge Hays' view, not concurred in by Chief Judge Lumbard, that the three-judge

"court is the only court which ever had jurisdiction over the constitutional claim. Since the single judge at no time had jurisdiction over the constitutional claim, there was never a claim before him to which the statutory claim could have been pendent" (221).

The premise is erroneous. 28 U.S.C. §1343(3), the jurisdictional basis for the constitutional claim and through it the pendent statutory claim, vests jurisdiction, as do the other provisions of the Judicial Code, e.g. §1331, in

the United States District Courts, not in any judge or judges thereof. At the outset of the case, Judge Weinstein, the initial District Judge sitting as the district court pursuant to the rules of court, was empowered to exercise the jurisdiction of the court. That this jurisdiction encompassed the entire case is clear. He could have for example, dismissed the entire case for want of a substantial federal question, Ex Parte Poresky, 290 U.S. 30 (1933); or issued injunctive relief on the grounds that the unconstitutionality of the statute was clear beyond doubt, Bailey v. Patterson, 369 U.S. 31 (1962); or he could have decided the pendent statutory claim favorably to Petitioners. Swift & Co. v. Wickham, 382 U.S. 111 (1965), thereby rendering resolution of the constitutional claim unnecessary. Chicago, Duluth and Georgian Bay Transit Co. v. Nims, 252 F. 2d 317 (6th Cir. 1958) (Stewart, J., then circuit Judge), cited with approval in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 n. 3 (1962); Ex Parte Hobbs, 280 U.S. 168 (1929). Cf., Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Some of these rulings might well have been erroneous, but the error does not inhere in an absence of jurisdiction in the district court under §1343(3).

The single-judge district court did none of these things, but rather, in the exercise of jurisdiction over the entire case, issued a temporary restraining order against Respondent and, acting on Respondent's urging, promptly requested the Chief Judge of the Second Circuit to convene a three-judge district court pursuant to 28 U.S.C. §2284.

When the three-judge tribunal was convened, the source of its power to adjudicate this case stemmed from the district court's jurisdiction under 28 U.S.C. §1343(3). 28 U.S.C. §2284 assuredly does not confer general jurisdiction upon courts or judges over claims or cases falling within its terms. Assuming the non-applicability for some reason of §1343 (and the other jurisdiction-conferring provisions) to a case falling within \$\2281 and 2284, a properly convened three-judge court would have no more power to decide the case than a single-judge court. Section 2284 in a word constitutes a procedural mechanism that removes a bar to the issuance of a particular form of relief that is imposed by 28 U.S.C. §2281 upon a single judge in a case over which the court, pursuant to some other provision, has jurisdiction. Whether that \$2281 bar, where improperly invoked or disregarded, is properly denominated as "jurisdictional" in light of the consequences that ensue on appeal in this Court or the Circuit Court is of no relevance. 28 U.S.C. §§1253, 1291. See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 153 (1963) (dictum); Borden Co. v. Liddy, 309 F. 2d 871 (8th Cir. 1962).

What is of relevance is that the function of 28 U.S.C. §2284 is to enable the issuance of injunctive relief, otherwise barred by §2281, against state statutes that are unconstitutional, and unconstitutional in a special sense, Swift & Co. v. Wickham, supra. That is the burden of the statutory language in these provisions, and §2284 is to be seen "not as a measure of broad social policy to be construed with great liberality," but as "an enactment technical in the strict sense of the term and to be applied as such." Phillips v. United States, 312 U.S. 246, 251 (1941); Swift & Co. v. Wickham, supra.

The convening of the three-judge tribunal was of no more significance in respect to federal power over these claims than would review of these claims by a tribunal improperly constituted under 28 U.S.C. §47, barring a trial judge from sitting on the appeal. For the same reason, dissolution of the three-judge court is of no significance to the power of the district court over the case under §1343. The case was not dismissed by that dissolution. Bather a claim over which the district court concededly had pendent jurisdiction was left for further proceedings. That claim was properly before the single district judge both pursuant to the terms of the remand and because he was the judge initially assigned to it. It called for relief that a single judge was not barred from granting. Swift & Co. v. Wickham, supra.

What is at issue herein thus is the exercise of the power of the district court over the pendent claim, not the wisdom of the three-judge tribunal's decision to dissolve. On that latter question, however, nothing in the language of 28 U.S.C. §2284 demands that a three-judge court must resolve each and every claim in a case properly before it. That statute is designed to enable a particular form of relief, and, as this Court has observed:

"The three-judge court procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended." Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co., 292 U.S. 386, 391 (1934).

That the three-judge court, because it is a district court, has the power to fully decide the case before it, Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960), does not require the exercise of such power. Thus at least three reported lower court decisions have found

some questions in cases falling within §2284 best left to the initial district judge. Landrey v. Daley, 288 F. Supp. 194 (N.D. Ill. 1968) (three-judge, returning issues to a single judge); Chester v. Kinnamon, 276 F. Supp. 717 (D. Md. 1967); Hobson v. Hansen, 256 F. Supp. 18 (1966) (Order of Bazelon, C.J.). Cf., Chicago, Duluth and Georgian Bay Transit Co. v. Nims, 252 F. 2d 317 (6th Cir. 1958).

In this case, after the determination of mootness, the relief requested no longer required a three-judge court.114

In light of the scope of the constitutional attack and the prayer for declaratory relief, it may be that the initial convening of the three-judge court was neither necessary nor appropriate. Were this Court to find, contrary to our argument, that dissolution bears an implication for the power of the district court upon remand, we then ask this Court to deal with the above threshold question, since the dissolution becomes completely academic if a three-judge court was not initially required. Our argument on this question is set forth more fully in the Joint Appendix (260-271; Tr. 104-125). See also note 117, infra.

¹¹⁴ Because the equal protection claim was founded on identity or similarity of living costs in the metropolitan counties outside New York City and the City, considerable question existed at the outset over whether that claim constituted the state-wide attack necessary for the convening of a three-judge court, Moody v. Flowers, 387 U.S. 97 (1967); Griffin v. Cuniy School Board, 377 U.S. 218 (1964). See also Rorick v. Board of Comm'rs of Everglade Drainage Dist., 307 U.S. 208, 212 (1939). To avoid this complexity in the interest of obtaining a prompt ruling on the potentially dispositive statutory claim, Petitioners did not initially seek a pre-liminary injunction on the equal protection claim and opposed New York's motion to convene a three-judge court (260-271; Tr. 104-125), cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963). Though the single district judge recognized some discretion in convening a three-judge court in the circumstances (75), such a court was convened as the appropriate vehicle for speedy resolution of the case, with the decision of the three-judge court also representing the decision of the single-judge district court for purposes of appellate review (262-264; Tr. 108-111), Mengel-koch v. Industrial Weifare Comm., 393 U.S. 83 (1968); Rosado v. Wyman, — U.S. —, 88 S. Ct. 2134 (1969).

Swift & Co. v. Wickham, supra. There was no longer the possibility stressed in Florida Lime & Avocado Growers. supra, and Brotherhood of Locomotive Engineers v. Chi. cago, R.I. & P. Ry., 382 U.S. 423 (1966), in support of the exercise of power by a three-judge court over the case, of a single judge entering the relief specifically barred by §2281.116 Nor was there the alternative possibility of a three-judge court needlessly passing on a constitutional claim when a statutory ground would dispose of the case. cf. King v. Smith, 392 U.S. 309 (1968).116 Even if the "political" aspects of this case were thought to indicate three-judge treatment, in that it was, fortuitously, possible, countervailing interests must be considered. Prompt disposition was of the utmost urgency, both because of the July 1 implementation date and to permit either party an effective opportunity of appellate review before July 1. The proofs on the statutory issue were substantial and the statute, then unconstrued, required a careful search of the legislative record. Judge Weinstein had been immersed in these tasks on a nearly full-time basis for several days and was familiar with the submissions from the outset. Indeed, his extraordinary efforts to demonstrate that courts can respond quickly to problems requiring speed deserve special tribute. Surely if the three judges, one from the Circuit Court, had not only to examine closely

¹¹⁸ As this Court stated in Florida Lime Growers, supra, in upholding the power of a three-judge court over a statutory claim:

[&]quot;To hold to the contrary would be to permit one federal district court judge to enjoin the enforcement of a state statute on the ground of federal unconstitutionality whenever a non-constitutional ground of attack was also alleged." 362 U.S. at 80. (Emphasis added.)

¹¹⁶ This situation would certainly argue against reference of some non-constitutional claims to a single district judge.

these materials, but also to circulate opinions and agree upon resolution, the July 1 deadline and the desired opportunity for appellate review might well have not been met. This urgent need for rapid disposition, in our view, more than counterbalances any "political" advantages, assuming these are at all relevant, thought to flow from a three-judge ruling. Indeed, Respondent objected neither to the dissolution and remand nor to Judge Weinstein's prompt exercise of pendent jurisdiction. "IT"

Under the Standards Set Forth in Gibbs, Exercise of Pendent Jurisdiction Was Compelled.

Judge Weinstein had jurisdiction, that is power, to decide the pendent federal claim. We turn to the question whether exercise of that power can possibly be deemed an abuse of discretion.

It is well settled that exercise of pendent jurisdiction is a matter of discretion. Note, The Evolution and Scope of

Hence, we do not add to the multitude of issues already before this Court the correctness of the ruling on mootness, since relief has now been granted on that claim in a subsequent case, Rothstein v. Wyman, — F. Supp. —, 69 Civ. 2763 (S.D.N.Y. 1969) (preliminary injunction entered October 22, 1969) and, as we shall see, the ruling does not bear upon the discretionary exercise of jurisdiction in the district court. Assuredly, all issues in the case, including the merits, are before this Court on the unlimited grant of the writ of certiorari to the Court of Appeals, where, after this Court's dismissal of the three-judge court appeal, all appeals were consolidated. The merits have been fully explored in the district court and the Court of Appeals, and they are before this Court either as an aspect of the three-judge or one-judge proceedings in the district court and the review in the Court of Appeals. This is not a case where this Court is without benefit of adequate confrontation and rulings on the merits below. Eq., Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73 (1960). Were this Court to find that relief should have been entered by the three-judge court, it may, of course, direct the remand to that court for the entry of the proper decree.

the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018, 1045 (1962). United Mine Workers v. Gibbs, supra, reiterates that point: The doctrine's "justification lies in considerations of judicial economy, convenience and fairness to litigants," 383 U.S. at 726, and these generally provide the controlling principles for the exercise of discretion. As we shall see, all of these factors, and some others, compelled the exercise of jurisdiction in this case. But before turning to these factors, it must be emphasized that the principles of limitation on the exercise of pendent jurisdiction set forth in Gibbs, and all previous cases we know of, are formulated in reference to pendent state law claims. Rather strict ones are warranted because "needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law," 383 U.S. at 726. See also Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Probs. 216, 233 (1948). State laws reflect state policies, and federal courts should respect the state interest in effectuation of those policies unless they are invalid under the Constitution or Acts of Congress. Clearly, state policy is undermined as effectively by erroneous interpretation of state laws as by application of a general "federal" common law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938). Cf. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

These considerations are foreign to the exercise of jurisdiction over a federal cause of action. Let it not be mistaken that the pendent claim here requires only an interpretation and application of federal law. That Respondent opposes our view of controlling federal law, or that he defends the validity of a state law, the meaning of which is not uncertain, does not transmogrify this into a "state" law case. The only dispute in this case is over the meaning and effect of a federal statute. Federal courts are certainly the appropriate forum for resolution of such federal questions, for, "a surer-footed reading of applicable law," as indeed this Court observed in Gibbs in deeming it relevant to the exercise of jurisdiction over a state law claim that the claim may be related to federal "policies." 383 U.S. at 726. Where, as here, the pendent claim for relief is wholly federal (as federal as the jurisdiction-conferring equal protection claim) the only considerations relevant to the assertion of jurisdiction at any stage of the proceedings are whether the pendent claim involves the sort of minor controversy that Congress intended to bar from the federal courts through the use of jurisdictional amounts, or whether a merely frivolous jurisdiction-conferring claim is asserted. It should be obvious that neither of these limitations obtain here. The constitutional claim was more than colorable; it was concededly substantial (indeed meritorious in the view of a unanimous three-judge court)118 and it affected the welfare of thousands of needy children. The pendent statutory claim is, in everyone's view, including Respondent's, anything but trivial. In these circumstances the same notions of comity, and justice between the parties, that invite reference of state law claims to the state courts compel resolution of a federal claim in a federal court. Indeed, burdening state courts with substantial and far-reaching federal claims over which there is concededly federal power itself raises questions of comity. That course has nothing to recommend it, save that it

¹¹⁸ Rothstein v. Wyman, supra.

may be of tactical (and unfair) advantage to one of the parties.

We now show that under the standards established in Gibbs, albeit for considerations not pertinent here, the District Court's exercise of discretion was both appropriate and compelled. At the time of remand, a substantial commitment of federal judicial resources had already been made to the case. Five separate district court hearings were held at which extensive affidavits, exhibits and testimony were presented, including that of state and city offcials. Seven memoranda, opinions, and orders of the district court were issued prior to the remand. These hearings and judicial opinions involved proofs and rulings on both the constitutional and statutory claims. 119 Sufficient showing had been made to justify the issuance on both claims of a restraining order, which was not disturbed by the three-judge court. In addition, substantial statistical material and charts were prepared and submitted by the parties and by the New York City Department of Social Services under subpoena, and were analyzed by the Court. In short, virtually a full trial had already been had in a case where summary judgment based on the record was destined to be dispositive. Cf. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Note, The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts, 62 Colum. L. Rev. 1018 (1962). Judge Weinstein required no further hearings or testimony prior to issuing his preliminary injunction opinion on May 15, three days after the case was remanded to him. His sixty-four

¹¹⁹ At the time of the summary judgment proceeding before the three-judge court, Judge Moore noted that the legal memoranda and briefs on all issues added up to "6 and 7-eighths inches." Tr. 4; Doc. No. 41.

page opinion was based on the record developed prior to the dissolution of the three-judge court. Summary judgment motions were continued only to allow clarification of the precise magnitude of the public assistance cutback. Indeed, Respondent admitted in his application to the Court of Appeals for a stay of the summary judgment proceedings that "every real issue in the case has been decided by the District Court and is presently before this Court" 120 (242).

Critical also to the exercise of discretion was the need. agreed upon from the outset, for resolution of the validity of \$131-a before July 1, 1969. As found in the order entered April 24, 1969, "all parties agree that time is of the essence . . . [D]elay would be costly to all concerned" (75). Dismissal in mid-May doubtlessly would have prevented any adjudication of validity before July 1, 1969. Adjudication after July 1 would have been both expensive and harmful to all parties concerned. "Both sides have indicated that prejudice will result should §131-a be declared invalid after administrative action has been taken" (75). There were also, at a minimum, substantial questions of independent basis for jurisdiction heretofore undecided by this Court. The presence of these questions, which, if we are right, leave no discretion to the district court, also argued for adjudication on the merits, with a view toward ultimate disposition of the case after one review in this Court.

¹³⁰ In view of these developments, Chief Judge Lumbard's statement that

[&]quot;the constitutional claim had been dismissed well before a decision on the merits, and thus there had not been a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge" (233)

is plainly inaccurate.

It is significant in this regard that Respondent did not after remand request Judge Weinstein to decline further jurisdiction, or indeed object to the remand from the three-judge court.

Under these circumstances, as Judge Feinberg noted in dissent below, the matter "begged" for the prompt decision of the federal court (236).

The Reasons Given Below Are Neither an Appropriate Nor Sufficient Basis for Finding an Abuse of Discretion in the Exercise of Pendent Jurisdiction.

Two reasons were given below to outweigh these compelling factors pressing for exercise of jurisdiction. In Judge Hays' words "the practical effect of an injunction is to order the state legislature to appropriate more funds for welfare" (222). Secondly,

"H.E.W., with its acknowledged expertise in the field of social security, is far better equipped than the federal courts to review an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act. The district court, even if it had power to act on the pendent claim, should have declined to do so, at least until H.E.W. had completed its consideration of the matter" (223).

The first reason says the case is "almost" non-justiciable; the second says it is "almost" unripe. Both views are, we believe, clearly erroneous under this Court's decisions. But neither reason is relevant to the exercise of discretionary jurisdiction. The case should still be decided, one way or the other.

The discretionary refusal to exercise pendent jurisdiction, as we have pointed out, serves primarily to protect the competency of state courts to expound state law. United Mine Workers v. Gibbs, supra. In the context of pendent federal claims, a comparable rule might serve to protect federal courts against adjudication of trivial lawsuits. The obvious fact in either case is that suit may be brought in state court seeking exactly the same relief. The basis of the suit in state court will once again be federal law, which the state courts must enforce. Testa v. Katt. 330 U.S. 386 (1947). Their decisions on matters of federal law are ultimately reviewable in this Court. 28 U.S.C. §1257. Certainly the state courts may not discriminate against this federal claim, declining to decide it by saying it is almost nonjusticiable, or almost unripe. They must decide it. The case will not go away. It merely becomes, at great expense to the parties, the burden of the state courts-courts which are not the preferred tribunals to decide substantial issues of federal law. The majority below thus misuses the limitations on pendent jurisdiction, limitations designed to allocate decision-making competence within the federalstate judicial system, by making them the basis of a refusal to confront and decide issues of justiciability and ripeness.

Petitioners further submit that under this Court's holdings in Damico v. California, 389 U.S. 416 (1967) and King v. Smith, 392 U.S. 309 (1968), no substantial doubt whatever exists that this case is justiciable and ripe. If Petitioners' view of §402(a)(23) is correct, the district court correctly issued the relief sought herein, relief that is in no way extraordinary. Moreover, that relief must issue without regard to the "pendency" of interminable negotiations between H.E.W. and the State to which these litigants are not

and may not become parties. We deal first with the problem of relief.

a. Petitioners are not presenting any constitutionally based argument that there is a right to welfare; or that New York must adequately provide for them. 121 Rather they seek enforcement of congressional mandates requiring that states which accept the hundreds of millions of dollars of federal monies made available under AFDC must carry out national program objectives. Whatever the limits of Congress's power to utilize the federal courts to impose directly obligations upon the states, cf. Maryland v. Wirtz, 392 U.S. 183 (1968); "there is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid." King v. Smith, 392 U.S. 309, 333 n. 34 (1968); see also Ivanhoe Irrigation District v. McCracken. 357 U.S. 275, 295 (1958); Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947).

King v. Smith, supra, likewise makes clear the procedural mechanisms by which state compliance with the Social Security Act may be obtained by injured recipients. State officials can be sued to restrain them from implementing invalid state laws without raising Eleventh Amendment problems. Thus, in King this Court affirmed a lower court decree restraining state officials from implementing state legislation in conflict with plan condition 9, now 10, 42 U.S.C. §602(a)(10). All this, we believe, should be basic.

¹²¹ Cf. A. Berle, The Three Faces of Power, at 9 n. 6 (1967).

It says nothing more than that welfare litigants, like all other petitioners in federal courts, are entitled to application of the doctrine of Ex Parte Young, 209 U.S. 123 (1908) and its progeny; e.g., Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U.S. 278 (1913); Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952). Actions restraining state officials from enforcing invalid state laws are not against the state and are not barred by sovereign immunity. While Ex Parte Young itself may be based on a fiction, the doctrine is "indispensable to the establishment of constitutional government and the rule of law." 122

The difference between this case and King v. Smith, supra, is that petitioners here seek compliance with plan condition 23; while in King enforcement of plan condition 9 was sought. Judge Hays and Chief Judge Lumbard, however, saw a compelling difference in that King v. Smith specifically mentions that Alabama can continue participation in the AFDC program without necessarily spending more money on welfare programs. For several reasons, petitioners submit that there is no compulsion whatever in this difference. First, the Court's statements in King were not addressed to the propriety of issuing the injunctive relief sought, but were merely to note that the flexibility generally afforded the States by Congress in the Social Security Act was not contravened by the Court's interpretation of the statute. Alabama's authority to adjust benefits was adverted to as an instance of that flexibility. But flexibility as to the amount of resources a state devotes to public assistance survives here as well. The Act leaves the States free to determine the amount of allowable re-

¹²² C. Wright, Handbook of the Law of Federal Courts 161 (1963).

sources for recipients, the financial obligation of responsible relatives, the use of liens and assignments of property, and the breadth of the obligation to repay. 42 U.S.C. 6602 .(b). Under AFDC states may or may not provide aid to children over 18, or to children in foster homes or homes with an unemployed parent. 42 U.S.C. §§606(a), 607(b), 608(d). States may also eliminate an array of optional services they provide for AFDC families, 42 U.S.C. \$\602 (a) (13), (14) and (15), determine the extent of local finaneial participation, 42 U.S.C., §602(a)(2), and may eliminate extraordinary administrative expenses through use of a declaration system for determining and redetermining eligibility, as H.E.W. recommends.123 They may also reduce expenditures in the other federally financed programs. To be sure, these may not be desirable alternatives, any more than an overall cutback after King v. Smith, supra, or Shapiro v. Thompson, 394 U.S. 618 (1969) was desirable. See also Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1969), prob. juris. noted, 38 U.S.L.W. 3127 (Oct. 13, 1969). Indeed the States did not rush to slash benefit levels upon the impact of compliance with constitutional or statutory mandates on eligibility. New York may well decide that maintenance of previous efforts is the more appropriate response. But continuation of previous expenditures is but one of the alternatives open to New York under the relief sought in this case.124

¹²³ See 45 C.F.R. §205.20 (Jan. 17, 1969).

¹²⁴ See generally, The Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance (May, 1964). As that report notes:

[&]quot;Perhaps the area of greatest flexibility allowed the States in administering the public assistance programs is in the determination of eligibility requirements for recipients." Id. at 30.

Equally important, the state is not by the terms of the decree required to spend any money at all. All that is sought is an order barring implementation and enforcement of invalid state law. No expenditures whatever are thereby required. The state may save a great deal of money by deciding simply to withdraw from the AFDC program. Its officers will not then be violating federal law. This response by the State is improbable but not for reasons related to the terms of the relief requested. Federal courts have frequently issued restraining decrees where the likely effect is to compel state legislative action. See e.g., Westberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964) and their progeny. Cf. Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963). So long as the state's action is not

After setting forth the array of state statutory and administrative provisions, aside from grant levels, that have an impact on the public assistance programs and the size of recipient rolls, the Commission concluded:

"The point of all this is that States do have a great deal of leeway in shaping their public assistance programs. The data presented above should dispel some of the commonly held beliefs that the Federal Government exercises such a heavy control over public assistance programs as to substantially eliminate policy discretion at the State level . . . [i]t should be emphasized that the presence or absence of the types of State requirements described above have an obvious effect upon State and Federal costs for public assistance." Id. at 59.

¹²⁵ To be sure, some responses by the State to an injunction against its officials are more favorable to Petitioners than others. In this respect, the situation is comparable to equal protection cases where the plaintiff who wins may merely succeed in drawing everyone else down to his level rather than improving his own position.

128 Indeed, federal power to direct state or federal officials to conduct a state election on a state-wide basis would seem a far more difficult Eleventh Amendment problem than any question of relief presented here.

decreed but is a response to the Court's action, chosen in preference to the state of affairs which would exist without such a response, no problem of federal power arises.

In any event, it is doubtful that any absolute bar exists to compelling state officials to spend money. For example, this Court, in Griffin v. County School Board, 377 U.S. 218 (1964), issued an order directing defendants, one of whom was the State Superintendent of Education, to reopen the schools and if necessary to raise taxes to do so. Similarly, that state legislative officers might have to be ordered to seat an invalidly excluded state representative did not bar this Court in Bond v. Floyd, 385 U.S. 116 (1966) from issuing declaratory relief. Indeed, in one of the early landmarks of our federalism, Osborne v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824), this Court, in an opinion written by Chief Justice Marshall, ordered repayment of improperly exacted state taxes. These questions are subtle no doubt, and they need not be pursued here. This case clearly falls within the general rule. They serve to point up, however, that even where the conflict is squarely posed there are no absolutes in this area. Each such issue must be evaluated in terms of the nature of federal interference, and the nature of state interest infringed upon. Cf. Maryland v. Wirtz, 392 U.S. 183 (1968); Parden v. Terminal Railway, 377 U.S. 184 (1964).

b. The second reason for holding Judge Weinstein's exercise of pendent jurisdiction an abuse of discretion—that the Department of Health, Education and Welfare "is far better equipped than the federal courts to review an alleged inconsistency between" the state and federal statutes—directly conflicts with this Court's holdings in Damico v. California, 389 U.S. 416 (1967), King v. Smith,

392 U.S. 309 (1968), and its recent summary affirmance in Shapiro v. Solman, 38 U.S.L.W. 3125 (October 13, 1969). In all three cases, this Court did not require a litigant to await H.E.W. action before suing on a Social Security Act claim in federal court. In a word, no such delays are proper where the recipient has no right whatever to initiate an H.E.W. proceeding or to be a party to any proceeding that H.E.W. might initiate.

We first develop that the issue in this case is in exactly the same procedural posture vis-a-vis H.E.W. as was the issue in *King*; we then demonstrate that the reasons underlying this Court's holdings in *Damico*, *King* and *Shapiro* are sound.

States desiring to take advantage of the substantial federal funds made available under AFDC are required to submit a plan to the Secretary of Health, Education and Welfare for his approval. 42 U.S.C. 66601-604. The plan must conform with federal statutory requirements (such as 402(a)(23)) and with regulations promulgated by H.E.W., 42 U.S.C. §602. Unless H.E.W. approves the initial plan, federal funds are not supposed to be released to the states for its implementation. 42 U.S.C. §601. Once initially approved, federal funds are provided until a change is formally disapproved. 42 U.S.C. §604(a). As was the case in King v. Smith with regard to Alabama's substitute father regulation, H.E.W. has never approved or disapproved New York's welfare cuts. Although this suit was initiated prior to the operative date of §131-a, it is now seven months since that statute became a part of New York's AFDC plan, and four months since it was implemented by Respondent, and H.E.W. has still neither approved nor disapproved this major change. Rather, H.E.W. has informed New York.

in early April, that "questions" exist whether §131-a complies with the Social Security Act (and it clearly does not even on H.E.W.'s reading of §402(a)(23), 45 C.F.R. §233.20 (a)(2)(ii)). H.E.W. requested New York to supply the agency with information showing that "the State has a need standard in effect . . . which has been adjusted since January 2, 1968 to reflect fully changes in living costs." To date, New York has not provided this information except to send H.E.W. the implementing regulations for §131-a. Nonetheless, the cuts are part of New York's AFDC plan and federal funds are still being made available to New York.

It is against this background of informal negotiating procedures that the reliance below on a "study" being made by H.E.W. and on "review proceedings" initiated by H.E.W. must be assessed. No proceeding whatever in the formal sense had or has been commenced. H.E.W. was doing no more and no less in this case than it was doing in King v. Smith. 128 H.E.W. stands ready to negotiate with the State once the State, in its own time, provides the necessary information. The time period over which those negotiations will proceed is entirely indefinite.

To be sure, H.E.W. does have the power to cut off, entirely or partially, federal payments if "in the administra-

¹²⁷ Letter of James Callison to George K. Wyman, April 16, 1969 (108).

¹²⁸ Chief Judge Lumbard's effort to avoid this Court's holding in King on the ground that "H.E.W. had already given notice to the state that its regulation did not conform" treats rather lightly this Court's explicit observation in King that "Alabama's substitute father regulation has been neither approved nor disapproved by H.E.W." 392 U.S. 309, 317, n. 11. Precisely the same is true herein; H.E.W. has neither approved nor disapproved §131-a.

tion of the plan there is a failure to comply substantially with any provision required by \$602(a) of this title to be included in the plan." 42 U.S.C. \$604. This can be done forthwith or after the State or H.E.W. initiates a "conformity hearing," to which the State and H.E.W., and only they, are parties. 42 U.S.C. \$604(a). The State has a right of review after an adverse decision. 42 U.S.C. \$1316. This power is virtually never used by H.E.W. As Secretary Finch informed petitioners, hearings on conformity of State laws are held "only on the initiative of [H.E.W.] as a last resort." 129 Thus, to our knowledge, only two final determinations of nonconformity of State AFDC plans have been made since 1935. Altmeyer, The Formative Years of Social Security (1968), at 75.

The reasons for H.E.W.'s reluctance to invoke its ultimate power are not far to seek. H.E.W.'s role vis-a-vis the states is primarily cooperative, assisting the states in drafting legislation and regulations—the great body of which poses no issue of state intent to defeat the objectives of federal law—which comply with the complex formal requirements created by Congress. H.E.W. guides the

¹³⁰ Letter of Robert H. Finch to Richard J. Flaster (131).

¹⁸⁰ As summarized in the Report of the Advisory Commission on Intergovernmental Relations, op. cit.:

[&]quot;Through such devices as the administrative review, routine financial and statistical reports, planned consultations by regional personnel with State personnel, as well as through other formal and informal means, the Federal agency keeps informed as to whether a State plan complies—on paper and in actual operation—with the Federal act . . . It should be noted that as a practical matter Federal professional personnel, especially those in the regions, and State professional personnel work together very closely, and that they are usually rather well-informed of the others' intentions and actions. Consequently, it is not often that a new State action or a Fed-

states in creating cost-saving administrative mechanisms. cost saving for the federal government as much as for the states. Generally these are not mandatory on the states. Plainly the goal of achieving state cooperation in these efforts will be undercut by threats of immediate cut-off. Finally, and most importantly, the political difficulties involved in obtaining compliance by cutting off funds are obvious and overwhelming. While the theoretical difference may seem slight, there is enormous practical difference between a court's ordering compliance, leaving it to the state to drop out of AFDC if it so chooses, and an order directing that AFDC funds cease forthwith.181 This difference is exacerbated where, as here, the state administrator. with whom H.E.W. negotiates, is without power under state law to comply with any H.E.W. directive. For these reasons, commentators,132 and H.E.W. itself, have recognized that their formal power to terminate funds is not a viable remedy to control state refusal to comply with federal conditions. Indeed H.E.W. itself has sought relief in the federal courts, rather than invoking its own ultimate power to terminate funds. United States v. Frazer, 297 F. Supp. 319 (M.D. Ala., 1968).

The question, then, is whether these administrative relationships between H.E.W. and the states serve to bar a

eral requirement arises totally unexpectedly." The Advisory Commission on Intergovernmental Relations, Statutory and Administrative Controls Associated with Federal Grants for Public Assistance, 62 (1964).

¹³¹ The difference lies not in the source of relief, court as against agency, for even if H.E.W. orders cut-off of funds that order may be taken to court, but rather that, in one case, the State must affirmatively choose to get out of the program. Affirmative action is hard to obtain, and the counsel of cooler heads is likely to prevail.

¹³² Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

litigant from asserting his rights under federal law in court. The answer that this Court has three times given, and the only answer consistent with general principles of administrative law, is no. In Damico, King, and Shapiro v. Solman relief was granted immediately with no recourse to H.E.W., both because this suit is maintained under 42 U.S.C. §1983, where administrative exhaustion is not required, McNeese v. Board of Education, 373 U.S. 668 (1963), and because there is nothing to exhaust. This issue is whether these cases are to be overruled. We think is this an answer that need be grudgingly given, a consequence of congressional oversight. H.E.W. amicus participation in federal court litigation provides a sound basis for ensuring immediate vindication of crucial rights without loss of administrative expertise.

Two functionally interrelated doctrines of administrative law—exhaustion of remedies, and primary jurisdiction—serve to bar litigants in some situations from the federal courts. The court below did not say whether it was applying one or the other or some combination of the two. Both serve not as absolute bars to relief but rather to govern the timing of judicial action. See L. Jaffe, Judicial Control of Administrative Action, 425 (1965). Generally the exhaustion requirement applies when a litigant seeks relief from administrative action claimed to be harmful—not the case here in regard to H.E.W. The doctrine's major function

aff g 300 F. Supp. 409 (D. Conn. 1969) (three-judge); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967). Prior to Rosado, other courts understood this mandate clearly, e.g., Solman v. Shapiro, supra; Williams v. Dandridge, supra; Lampton v. Bonin, supra; Jefferson v. Hackney, supra. The Second Circuit has now set out on its own course. Rothstein v. Wyman, supra. The general problem is explored in Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967).

is to ensure administrative finality prior to judicial intervention. Thus, a litigant may not bypass the administrative forum Congress has established for resolution of an issue by claiming that to proceed therein will cause irreparable damage. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).¹³⁴ Precluding resort to the courts preserves the integrity of the administrative process Congress has established.

The doctrine of primary jurisdiction, on the other hand. applies where competency on certain issues has been delegated by Congress to an agency, generally those agencies in the day-to-day business of regulating in comprehensive fashion key industries pursuant to broad congressional delegations, e.g., Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922). See generally K. Davis, Administrative Law §19.01 (1965). In such a case, courts should postpone action until the agency has acted on these issues. Gen. American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940). The agency determination will lay a sound basis for judicial review. While there is an obvious similarity in purposes to those served by the exhaustion doctrine in that both look to informed judicial review, a difference is that in primary jurisdiction cases the party seeking relief is typically not seeking it against the agency, but rather against another private party. Thus the usual focus of the exhaustion doctrine—the ripeness or finality of administrative action claimed to be harmful, e.g., Columbia Broadcasting System Inc. v. United States, 316 U.S. 407 (1942), is lacking. Indeed, in primary juris-

¹³⁴ Nor may review be had piecemeal of each and every interlocutory order, Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375 (1938).

diction cases the agency may not even be able to grant the full relief sought against the party. See Far East Conference v. United States, 342 U.S. 570 (1952); Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958).

Neither doctrine is applicable here. Both presuppose the actual availability of administrative action. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Frozen Food Express v. United States, 351 U.S. 40 (1956); Columbia Broadcasting System v. United States, 316 U.S. 407 (1942); see Jaffee, op. cit. supra at 424. The Court when invoking these doctrines says to the litigant in effect, you should not have come here, at least, not yet; you should go there. Obviously no such directive is appropriate where the litigant cannot and never could turn up at the agency door. Yet that is precisely the case under the Social Security Act. An AFDC recipient has no right whatever to any proceedings before H.E.W. on any issue whatever. H.E.W. has power to hold hearings to which it and the state are the only parties. The recipient cannot even require that a hearing so limited be held. H.E.W. will act only on its own initiation, and its taking action is not a realistic possibility for the reasons we have detailed. Informal agencystate negotiations may and usually do proceed indefinitely186 and no regard is had for the interim harms inflicted on recipients, whose interests are, if anything, immediate. Indeed, even where H.E.W. did act, recipients were denied

¹⁸⁵ The Court noted in King v. Smith the progress that this informal negotiating process had made in the case of Alabama's suitable home and substitute father regulations. Initial correspondence between H.E.W. and the State of Alabama began in April 1959. Suit was brought by recipients on December 2, 1966 with a final decision by the Supreme Court on June 17, 1968. H.E.W. to that date had not formally approved or disapproved the regulation in question.

standing to intervene when review of the subsequent order was sought in court by a state. Georgia v. Cohen, Case No. 26042 (5th Cir. 1968), dismissed Sept. 12, 1969.

We know of not one single case in federal law where a litigant was barred from court on the basis of failure to exhaust remedies or invoke an agency with primary jurisdiction when in fact he does not have, and never had, any opportunity to appear before the administrative body and participate in the development of the record therein. To hold to the contrary is to rule that the matter is non-justiciable for now and likely evermore.¹³⁶

The relationship of H.E.W. and the AFDC recipient may perhaps be atypical of the administrative process.¹⁸⁷ How-

King, making the statutory ground a preferred basis for decision is clearly a difference of no substance. The appropriateness of awaiting agency determination of statutory problems cannot turn on the happenstance of related constitutional issues. Cf. Myers v. Bethlehem Shipbuilding Corp., supra. Thus after the Court of Appeals decision in Rosado, a three-judge court in the Second Circuit decided a claim on constitutional grounds, refusing to rule on alternative statutory grounds because H.E.W. "action" was pending. Rothstein v. Wyman, supra. This is a flat disregarding of King.

¹³⁷ Compare however, Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1968) (3-judge court), a case which dealt with federal assistance to impacted school localities. The applicable statute in that case read:

[&]quot;The amount which a local educational agency in any State is otherwise entitled to receive . . . shall be reduced in the same proportion (if any) that the State has reduced for that year its aggregate expenditure (from non-federal sources) per pupil for current expenditure purposes for free public education (as determined pursuant to regulations of the Commissioner) below the level of such expenditures per pupil in the second proceeding fiscal year. The Commissioner may waive or reduce this reduction whenever in his judgment exceptional circumstances exist which would make its application inequitable and

ever, there is, in this setting, little purpose to be served by prior administrative recourse even were one available. First, the issues generally posed in welfare cases are whether specific congressional mandates are infringed by state laws and regulations. Usually there are few complicated factual issues of the sort that courts do not regularly deal with, and there is no problem of any agency developing a comprehensive scheme of industry regulation based upon broad congressional delegation of law-making power. Second, the basic value of judicial decision-making informed by administrative expertise, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), Federal Maritime Board v. Isbrandtsen Co., supra, is more than adequately served by H.E.W.'s participation as amicus curiae in welfare litigation where that is appropriate. H.E.W. has frequently so served.138 Criticisms of too rigid application of the primary jurisdiction doctrine have noted, Jaffe, op. cit. supra, at 133, that agency assistance to the Court often may be more quickly and cheaply achieved by agency presentation to the Court than through separate administrative proceedings. At the heart of this controversy is the construction of a federal statute on which H.E.W. has amply expressed its views, which are a part of the record in this case.

would defeat the purpose of this subchapter." 20 U.S.C. §240 (d).

The Court held that "the amendment provides only an administrative remedy of the Government and does not deprive the plaintiffs of standing to prevent future State infringement of their Constitutional right to the benefits of the aid purposed by Congress." 280 F. Supp. at 875.

¹⁸⁸ Kelly v. Wyman, 294 F. Supp. 887 (S.D.N.Y. 1968), prob. juris. noted sub nom. Goldberg v. Kelly, 37 U.S.L.W. 3399 (April 21, 1969) and see its briefs in Lampton v. Bonin and Jefferson v. Hackney which are printed in the appendix. H.E.W. has never opposed the duty of a federal court to proceed in such case.

The consequences of a holding that judicial enforcement of rights held justiciable in King v. Smith must await the outcome of H.E.W.'s meandering negotiations cannot be too highly stressed. The claims of AFDC children are invariably of the greatest immediacy, as the issuance of temporary relief in these cases makes clear. The substantial and uncontroverted evidence in this case shows that the level of public assistance to needy families in New York, even prior to the enactment of §131-a, provided "for life on a level of sustenance, nothing more, and often less." 139 The District Court found, and the finding has not been disturbed, that "a reduction in welfare benefits ... may threaten injuries to . . . children's physical and mental development far greater than the mere monetary loss in benefits." This recitation of Petitioners' economic and physical plight underlines the necessity for a speedy decision on the merits, a necessity to which Judge Weinstein responded admirably.

Judge Weinstein in no way abused his discretion by deciding this claim.

B. Independent Jurisdiction of a Claim Properly Brought Under 42 U.S.C. §1983 Exists Under Both 28 U.S.C. §1343(3) and 1343(4).

Although the District Judge had no need to reach these issues, Petitioners have from the start asserted §§1343(3) and 1343(4) as independent jurisdictional bases for the statutory claim, which is brought under 42 U.S.C. §1983. The Court of Appeals, erroneously we believe, held to the contrary. The issue is one of first impression in this Court. King v. Smith, 392 U.S. 309, 312 n. 3 (1968). Compare McCall v. Shapiro, — F.2d —, No. 33061 (2d Cir.

¹⁸⁹ Affidavit of Joseph Barbaro (Doc. No. 34).

August 11, 1969) with Gomez v. Florida State Employment Serv., — F.2d —, No. 26719 (5th Cir. October 9, 1969).

Title 28 United States Code, Section 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

- (3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens . . . ;
- (4) To . . . secure equitable or other relief under an Act of Congress providing for the protection of civil rights."

Subsection 1343(4) literally provides federal jurisdiction for any suit seeking equitable relief under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction also exists under §1343(3) since §1983 is an Act of Congress "providing for equal rights of citizens" within the purview of §1343(3). Respondent, however, contends that §1343(4) must be read in light of its history and not its words; whereas the Respondent argues §1343(3) must be read in light of its words and not its history. Petitioners will be happy with consistent application of either approach.

42 U.S.C. §1983 is relevant to jurisdiction under both subsections. It provides:

"Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable . . . in [a] suit in equity, or other proper proceeding for redress."

The statutory claim herein is clearly authorized by this section. The petitioners seek to restrain state officials from depriving them of "rights, privileges or immunities" secured by federal "laws," namely the Social Security Act. While that Act creates no absolute right to welfare as against the State, it does create rights of a different sort. namely the statutory right to public assistance in accordance with the Act's commands, which are binding on the States. King v. Smith, 392 U.S. 309 (1968). That the protection of this sort of interest constitutes a "right, privilege or immunity" for purposes of §1983 is made clear by numerous equal protection and due process claims brought thereunder. See, e.g., Damico v. California, 389 U.S. 416 (1967) (public assistance), Glicker v. Michigan Liquor Control Comm'n, 160 F. 2d 96 (6th Cir. 1947) (revocation of a liquor license), cf. Harmon v. Brucker, 355 U.S. 579 (1958),140

Nor is this claim outside §1983 because it is based upon a "law" and not upon the Constitution. The "laws" provision was added by Congress in 1875, R.S. 1979, — Stat. —, for the obvious purpose of permitting federal actions whenever federal rights were threatened or infringed upon by state officials. Although §1983 cases asserting rights solely on the basis of federal laws are rare, primarily because such laws either contain their own remedial provisions, Schatte v. International Alliance of Theatrical Stage Employees, 182 F. 2d 158 (9th Cir. 1950), or are in any event exempted from the amount in controversy requirement, see, e.g., 28 U.S.C. §1337, that this

¹⁴⁰ See generally Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84, 110 (1967).

¹⁴¹ Compare Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13.

is the rare case is besides the point. The statutory language says "laws", and reconstruction legislation is to be construed as meaning what it says. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). There is no basis, historical or appropriate, for selecting some "laws" as within §1983 and not others. As Judge Learned Hand said, in upholding §1983's coverage of suits to vindicate all federal statutory rights and privileges "the language [of 1983] is so plain that the only question is whether this particular "law" secured to the plaintiff a "privilege." Bomar v. Keyes, 162 F. 2d 136, 139 (2nd Cir. 1947); see also Greenwood v. Peacock, 384 U.S. 808, 829-30 (1966) (dictum); Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii 1956) (dictum); but cf. Holt v. Indiana Manufacturing Co., 176 U.S. 68 (1900).

The refusal to pick and choose among "laws" for which §1983 creates an action is supported by this Court's refusal to limit, despite earlier hesitation, the "constitutional" rights protected by §1983 to cases dealing with racial discrimination. All constitutional rights are protected by §1983, notwithstanding Respondent's assertions to the contrary. See, e.g., Monroe v. Pape, 365 U.S. 167, 180-183 (1961); Baker v. Carr, 369 U.S. 186, 200 and note 19 (1962); Douglas v. City of Jeanette, 319 U.S. 157, 161-2 (1943).

We turn then to the jurisdictional provisions. 28 U.S.C. §1343(4) provides that the district courts shall have orig-

¹⁴² To the extent these assertions are based upon cases construing the federal removal statute, 28 U.S.C. §1443(2), they are clearly inapposite. The removal provision must be

[&]quot;distinguished from laws, of which the Due Process Clause and 42 U.S.C. §1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." Georgia v. Rachel, 384 U.S. 780, 792 (1966).

inal jurisdiction of any civil action "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." 42 U.S.C. §1983 is an Act "providing for the protection of civil rights." Commonly known as the Civil Rights Act, its title, as originally passed in 1871 was:

"An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes."

Civil Rights Act of 1871, ch. 221, §1, 17 Stat. 13.

The clear purpose of the statute was protection of civil rights. Consequently, any cause of action under §1983 is "under" an "Act of Congress providing for the protection of civil rights." 28 U.S.C. §1343(4) therefore provides federal jurisdiction.

But Respondent asks this Court to ignore the literal language of §1343(4) in light of the purpose of Congress (precisely the reverse of Respondent's very literal position on §1343(3)). Subsection (4) was added to §1343 as part of the Civil Rights Act of 1957. Pub. L. No. 85-315, §121, 71 Stat. 637. The legislative history as to this provision characterizes it as a "technical" amendment conforming the jurisdictional provisions to the substantive law. H.R. Rep. No. 291, 85th Cong., 1st Sess., 11 (1957). But in enacting §1343(4), Congress acted on the intent to insure that all of the cases under the various Civil Rights Acts have a federal forum. Congress in 1957 may well have assumed that all claims under §1983 already had a basis for jurisdiction under §1343(3). But using §1343(4) as such a basis would conform to the central congressional intent of insuring that there be no civil rights action without a federal forum. In one of the few cases relying directly upon §1343(4) and §1983 the court found jurisdiction to hear a claim against police officers who assaulted and photographed a woman. In relying on §1983 the court implicitly confirmed that section to be a civil rights act for purposes of 1343(4), even though the case involved no racial overtones. York v. Story, 324 F. 2d 450 (9th Cir. 1963), cert. den. 376 U.S. 939 (1964). See also Gomez v. Florida State Employment Serv., supra.

Section 1343(3) is also a basis of jurisdiction. Its language generally parallels that of §1983, the major difference being that while §1983 creates a cause of action for deprivation of any statutory right, \$1343(3) confers jurisdiction where the rights are "secured" by an Act "providing for equal rights." Although the Court has never passed on the issue, the history of these provisions reveals beyond doubt that there was no intent to create a hiatus between the cause of action created by §1983 and the jurisdiction of the federal courts. Such a result would be absurd in that the very purpose of §1983 is to provide a federal remedy against state action illegal under federal law, McNeese v. Board of Education, 373 U.S. 668, 672 (1963). Thus, in Bomar v. Keyes, supra, Judge Hand simply assumed (or thought the point so obvious as to require no discussion), that §1343(3) provided a jurisdictional basis for any §1983 suit.

The origin of §1983 is Section 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. That same section provided that any substantive action thereby created could be brought in the federal district and circuit courts in the same manner as provided under the Civil Rights Act of 1866, ch. 31, 14 Stat. 27. There was thus at the start a rather clear intent

to establish a right to bring any authorized Civil Rights Action against state officials in the federal courts.¹⁴³

In 1875, as part of a full scale revision of the federal judicial statutes, the substantive provisions of 17 Stat. 13 became R.S. 1979, which was identical with the present 42 U.S.C. §1983. The jurisdictional provisions were found in two places. R.S. 563(12) provided for original jurisdiction in the district courts for any action brought to redress deprivation of rights secured by the Constitution or laws of the United States, which exactly tracks the language of §1983. R.S. 629(16) gave the circuit courts jurisdiction in actions to redress the deprivation of rights secured by the Constitution or by laws providing for equal rights. It seems clear that the intent of both clauses, despite the slight difference in language, was to ground jurisdiction for actions brought under R.S. 1979 and R.S. 1977 (the present 42 U.S.C. §§1983 and 1981, respectively). Both jurisdictional statutes are cross-referenced by the Revisors to R.S. 1977 and 1979. Contemporary judicial opinion while not considering the specific problem presented here, clearly recognized that R.S. 629(16), the circuit court provision, was merely the jurisdictional partner of R.S. 1979 (now §1983). Carter v. Greenhow, 114 U.S. 317 (1885) and Pleasants v. Greenhow, 114 U.S. 323 (1885).

These two jurisdictional statutes were consolidated and assumed their present form with the revision of the Judicial Code in 1910. Act of March 3, 1911, ch. 231, 36 Stat. 1087. The form of R.S. 629(16) was retained rather than that of R.S. 563(12). There is no explanation for the choice.

H. Wechsler, Federal Courts and The Federal System at 729 (1953).

The scant legislative history supports the conclusion that Congress intended to provide jurisdiction for all actions authorized by §1983. "This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts." S. Rep. No. 388, 61st Cong., 2nd Sess. Pt. 1 at 15 (1910).

Thus throughout the long history of these statutes every indication is that the scope of the jurisdictional statute is as great as its substantive counterpart, §1983. That the change of 1910 took place amidst a general revision of the judiciary code suggests even more strongly that Congress did not intend to change the jurisdictional framework to create a gap between the substantive action and jurisdiction to hear it. Any such result would be anomalous indeed. A comprehensive federal remedy is created, part of which cannot be enforced in a federal court.

Nor is such an anomalous conclusion compelled. Section 1983 is itself a statute providing for equal rights, for it grants those who are oppressed by state action a specific remedy. As this Court noted in Georgia v. Rachel, 384 U.S. 780, 792 (1966), §1983 is a law that "confer[s] equal rights in the sense, vital to our way of life, of bestowing them upon all." It also serves to "secure" such rights. This Court has recently indicated in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) that the Reconstruction civil rights statutes are to be given the full vigor intended by the Congress of that time even after 100 years of desuetude. Certainly, a revisor's technical change in language ought not substantially affect a statute which has remained a part of the Judicial Code throughout the last 97 years,

particularly where the congressional intent was to "vest" the prior jurisdiction in the district court.

A restrictive interpretation of §1343(3) combined with a restrictive interpretation of §1343(4), would create an anomalous category of cases where there is a substantial federal question and a federal cause of action, but no original inal federal court jurisdiction. This was at one time common, perhaps, but now the overwhelming majority of federal claims will ground jurisdiction in the federal courts regardless of amount in controversy,144 including well-nigh every claim founded on a federal regulatory or administrative program.145 Moreover, giving effect to the historic and functional inter-relationship of §1983 and §§1343(3) and (4) will not undercut the purposes of §1331 because the

A leading commentator concludes that there are today very few federal question cases for which the omnibus 28 U.S.C. §1331 with its amount in controversy requirement is necessary as a basis for jurisdiction. C. Wright, Handbook on the Law of Federal Courts, 91 (1963).

The Senate Judiciary Committee in 1958 cited claims arising under the Jones Act as the only significant class of federal question cases subject to the requirements of jurisdictional amount. S. Rep. No. 1830, 85th Cong., 2d Sess. (1958). Federal jurisdiction for

Jones Act cases is now provided. 46 U.S.C. §688.

¹⁴⁴ The patchwork quilt of statutes from 28 U.S.C. §§1333 through 1361 as well as many others create jurisdiction regardless of amount in controversy for claims in admiralty, patent, bankruptcy, antitrust, copyright and maritime cases, claims by or against the United States, claims arising under Acts regulating commerce or providing for internal revenue and many others.

¹⁴⁵ E.g., Agricultural Adjustment Act, Mulford v. Smith, 307 U.S. 38, 46 (1939); Fair Labor Standards Act, Williams v. Jack sonville Terminal Co., 315 U.S. 386, 390 (1942); Agricultural Marketing Agreement Act, Stark v. Wickard, 321 U.S. 288, 290, n. 1 (1944); N.L.R.A., Capital Service Inc. v. NLRB, 347 U.S. 501 (1954); Railway Labor Act, Felter v. Southern Pac. Co., 359 U.S. 326, 329 (1959); cf., Machinists v. Central Airlines, 372 U.S. 682, 696 (1963); Federal Employers Liability Act, Imm v. Union R.R., 289 F. 2d 858 (3d Cir. 1961).

cases thereby brought into federal court are only those against persons acting under color of state law. In any event, the reason behind §1331's closing the door to minor suits is the assumption, generally valid, that justice on such claims can be obtained in state court. That assumption, Congress felt, does not hold true in cases where the state court is asked to rule on the legality of state action by officials of the state.

A holding of no jurisdiction herein will, to the best of our knowledge, leave the categorical assistance titles of the Social Security Act as the only federal regulatory or administrative program in which federal questions can not be litigated in the courts of the United States.¹⁴⁶

C. General Federal Question Jurisdiction Under Section 1331 Was Properly Asserted by the District Judge Over the Federal Statutory Claim.

The District Judge was also required to exercise jurisdiction over the statutory claim on remand because independent jurisdiction, as he held, is conferred over it by 28

whether actions arising under the Social Security Act, Title IV, fall within 28 U.S.C. §1337, providing jurisdiction for all actions under Acts of Congress regulating commerce. The purposes of the Social Security Act, at its inception during the depression and today, certainly fall within modern constructions of Congress' power to regulate in areas affecting commerce, as was observed in Shapiro v. Thompson, 394 U.S. 618, 625 (1969) (Warren, C.J., dissenting) in regard to 42 U.S.C. §602. Nor is it necessary to decide whether the Act's guarantees of equal treatment of needy children, and uniformity within a state, viewed against the ad hoc administration of pre-depression welfare, suffice to render it an Act of Congress "providing for the equal rights of citizens." But these factors further confirm that actions against state officials to enforce the provisions of the Social Security Act were not, by design at least, intended to be excluded from the federal district courts.

U.S.C. §1331. The claim "arises under" federal law and "the matter in controversy exceeds the sum or value of \$10,000."

That the jurisdictional amount requirement applies in cases seeking injunctive or declaratory relief is beyond question. See, e.g., South Carolina v. Seymour, 153 U.S. 353 (1894). The amount in controversy is measured by evaluating the damage which may be visited on the plaintiff should he be denied relief. It is the "extent of the injury to be prevented" which must pass muster under the 10,000 standard. Gibbs v. Buck, 307 U.S. 66 (1939); McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936).

Applying this test, the District Judge found as a matter of fact, amply supported and uncontradicted by the evidence in the record, that plaintiff families "are at or below a base subsistence level" (173), and that denial of relief

"... putting their income substantially below that threshold may threaten injuries to their children's physical and mental development far greater than the mere monetary loss in benefits. Cf., Brown v. Board of Education, 347 U.S. 483, 494 (1954) (psychological damage resulting from improper schooling). Deprivation during early years may irreversibly retard mental and physical development and have an adverse impact on personality" (174).

Without controverting these findings, the majority below¹⁴ ruled as a matter of law that these injuries from reduced

¹⁴⁷ 1 Barron and Holtzoff, Federal Practice and Procedure (Wright ed.) §24, n. 54. See generally, Comment, Federal Jurisdiction: Amount in Controversy in Suits for Nonmonetary Remedies, 46 Calif. L. Rev. 601 (1958).

¹⁴⁸ As to this issue, Judge Lumbard agreed with Judge Hays' treatment.

grants were "indirect" and, as such "too speculative to create jurisdiction under Section 1331."

The Court of Appeals relied on a series of decisions denying jurisdiction under Section 1331 because the rights sought to be enforced are those to which "no test of money can be applied." Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847) (right to custody of a child); see also, Kurtz v. Moffitt, 115 U.S. 487 (1885) (habeas corpus case seeking personal liberty); cf., Hague v. Congress for Industrial Organization, 307 U.S. 496 (1939) (right to speak out against state legislation). These interests are among those for which a damage action is ordinarily unavailable; the right infringed is "utterly incapable of being reduced to any pecuniary standard of valuation," Barry v. Mercein, supra, 46 U.S. at 120. As such they are inapposite here.

The injuries Judge Weinstein found to be the result of the massive cutback of public assistance challenged herein—retardations of physical and mental growth caused by clinical malnutrition and education deprivations at an early age—have long been deemed capable of valuation. For example, were these harms caused or likely to be caused by a negligently manufactured drug, there is no question but that the \$10,000 requirement would be satisfied. These damages are not peculiarly difficult to value. Obviously the precise dollar value of such claims cannot be established to a certainty but allegations made in good faith are sufficient. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S.

¹⁴⁹ These interests might well be treated today as *ipso facto* satisfying the jurisdictional amount because they are not trivial, *Boyd* v. *Clark*, 287 F. Supp. 561, 568 (S.D.N.Y. 1968) (Edelstein, J., dissenting), *aff'd on alternative grounds*, 393 U.S. 316 (1969).

283, 288 (1938). Here the veracity of those allegations is confirmed by unchallenged findings.

The assertion that these harms are "indirect" and too "speculative" cannot mean that they are unlikely to occur. The district court entered findings of fact that these harms will occur as the direct result of severe reductions in the subsistence allowance. The finding, on this record, is not clearly erroneous. The probability of occurrence cannot therefore be discounted as the product of counsel's too vivid imagination. Nor can the District Court finding be overturned by appellate exercise of judicial notice as to the state of the real world. Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233 (1968) makes clear that questions of jurisdictional amount are to be treated as ones of fact. There a registrant claimed religious exemption from military service. Although plaintiff's interest in seeking such exemption had to do with conscience rather than money, this Court remanded for a factual hearing to ascertain whether the monetary consequences of the Local Board's action met the \$10,000 amount requirement.

This is not a case where a plaintiff seeking to vindicate a primary claim obviously worth less than \$10,000 seeks to base federal jurisdiction on allegations as to consequential damage. Here computation of the mere monetary loss to plaintiff depends on the difficult question of time period over which the losses to plaintiffs are accrued. Where such difficulties exist, courts do look to the total impact of the challenged action in order to decide the "amount in controversy." E.g., Oestereich v. Selective Service Local Board No. 11, supra. 150

¹⁸⁰ See generally, Note, Federal Jurisdictional Amount: Determination of the Matter in Controversy, 73 Harv. L. Rev. 1369, 1376 (1960).

Nor is this a case where the harms, even if they are to occur, may be deemed "speculative" and "indirect" on the ground that they are immaterial to the determination of the amount in controversy. The scope of interests to be included in the evaluation of the amount in controversy must be decided with reference to the purposes of the federal law under which relief is sought.¹⁵¹ The overall national exercise in AFDC is to protect dependent children against the long range harms of economic deprivation in childhood. Congress enacted Section 402(a)(23) out of a recognition of these consequences. Failure to protect children now from these harms renders subsequent legislative efforts mere palliatives.¹⁵² Thus, the precise interest Congress sought to protect by requiring a maintenance of effort was the right of a child to an adulthood free from the crippling

¹⁵¹ Thus, in *Marquez* v. *Hardin*, Civ. Action No. 544616 (N.D. Calif. 1969), the District Court was confronted with a claim by plaintiffs that the Secretary of Agriculture was obligated by federal statute and under the Constitution to provide them with the opportunity to participate in the free school lunch program.

[&]quot;Although the cost of a school lunch is only thirty-five cents, the amount in controversy for the purposes of §1331 is far greater . . . As Congress has expressly recognized, the right in question here is to good health, and to full physical and mental development" (Unreported Opinion at p. 11).

In the light of this legislative purpose, the court held that "these rights are not remote or incidental and the damages are not entirely speculative." *Id.* at 12.

¹⁸² The relationship of an inadequate subsistence budget to malnutrition has been noted in hearings held by Senator McGovern recently. Select Senate Committee on Nutrition and Related Human Needs, 90th Cong., 2nd Sess.; 91st Cong., 1st Sess., Parts I-XII (1968-69). Similarly, the relationship of an inadequate subsistence budget to educational opportunity has also been noted in Congress, S. Rep. No. 146, Committee on Labor and Public Welfare, 89th Cong., 1st Sess. (1965); and by the President, H. Doc. No. 45, 111 Cong. Rec. 508 (1965) (President Johnson's Message on Education to the 89th Congress, 1st Session on January 12, 1965).

blight caused by malnutrition and impaired education at an early age. Since these consequential impacts impelled Congress's action, it is improper to deem them "indirect" and not subject to valuation for purposes of the amount in controversy.

Further, we think the jurisdictional amount requirement was also satisfied by the simple monetary loss to individual families which will result from the continued enforcement of §131-a.¹⁵³

Actna Casualty Co. v. Flowers, 330 U.S. 464 (1947), is controlling on this question. Actna was a suit by a mother to determine the right of her family to receive a workmen's compensation claim available under state law. The benefits which the plaintiff there would have been able to receive if she prevailed were, at a maximum, \$72 a month, 330 U.S. at 465, a sum substantially smaller than the \$174 monthly that appellee Duffy or the \$361 monthly that appellee Miley lose as a result of the challenged statute. There, as here, the plaintiff's right to receive the payments might have been defeated by future contingencies. There, even though the payments would cease if the plaintiff remarried or died, the Court held that:

a possibility that payments will terminate before the total reaches the jurisdictional minimum is immaterial . . . Future payments are not in any proper sense contingent, although they may be decreased or

¹⁵³ Monetary loss must be calculated on the basis of the family, since the AFDC (Aid to Families With Dependent Children) grant is made to the family as an integral unit. 42 U.S.C. §606. Grants are not given to individuals or children, but to the parent as guardian of the children. Accordingly the parents sue here on behalf of themselves and their respective children comprising the AFDC family.

cut off altogether by the operation of conditions subsequent . . . 330 U.S. at 468.

Similarly, here plaintiffs' right to receive lawfully administered payments may be defeated by subsequent events, but it is the right to all the payments under a lawful system which is at issue. The events rendering plaintiffs ineligible for continued receipt of AFDC are no less contingent here than in Aetna; indeed they are the same events of death or marriage.

In view of the policy consideration behind the \$10,000 requirement, namely to remove petty controversies from the docket of the federal courts, 154 it would seem unwise to impose an exceptionally stringent burden on Petitioners here, where the harms sought to be avoided are monumental, the issues are of nationwide import, and affect the expenditure of millions. While these factors would not excuse plaintiffs from compliance with the technical requirements of jurisdictional amount, they bear upon the appropriate standards for reckoning that amount.

¹⁸⁴ In 1958 the jurisdictional amount was raised to \$10,000,

[&]quot;on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." S. Rep. No. 1830, 85th Cong. 2d Sess. at 3-4 (1958); 1958 U.S. Code, Cong. & Admin. News, pp. 3099, 3101.

CONCLUSION

The mandate of the Court of Appeals reversing summary judgment and vacating the preliminary and permanent injunctions should be reversed.

Respectfully submitted,

LEE A. ALBERT

Center on Social Welfare Policy and Law 401 West 117 Street New York, New York 10027 280-4112

Harold Edgab
Henry A. Freedman
Steven J. Cole
Sylvia Ann Law
Nancy Duff Levy
Of Counsel

CARL RACHLIN

General Counsel, National Welfare Rights Organization 180 Park Row New York, New York

MARTIN GARBUS

Roger Baldwin Foundation of the American Civil Liberties Union 156 Fifth Avenue New York, New York 10012

DAVID GILMAN

General Counsel, City-Wide Coordinating Committee of Welfare Groups c/o MFY Legal Services Inc. 759 10th Avenue New York, New York

CESAR PERALES

Williamsburg Legal Services 260 Broadway Brooklyn, New York 11211

VIBGINIA SCHULER

Brownsville Legal Services 424 Stone Avenue Brooklyn, New York

HABOLD J. ROTHWAX

ERIC HIRSCHHORN

MFY Legal Services, Inc.
320 East Third Street

New York, New York

MORT COHEN

South Brooklyn Legal Services 152 Court Street Brooklyn, New York 11201 .

H.F.W. Brief in Lampton, et al. v. Bonin, et al.

UNITED STATES DISTRICT COURT

Eastern District of Louisiana

New Orleans Division

Civil Action No. 68-2092 Section "E"

SHIRLEY LAMPTON, et al.,

Plaintiffs,

GARLAND L. BONIN, et al.,

Defendants.

Brief of Robert H. Finch
Secretary of Health, Education, and Welfare
as Amicus Curiae

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[•] Omitted in printing.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

CIVIL ACTION No. 68-2092 SECTION "E"

SHIRLEY LAMPTON, et al.,

Plaintiffs,

GARLAND L. BONIN, et al.,

Defendants.

BRIEF OF ROBERT H. FINCH
SECRETARY OF HEALTH, EDUCATION, AND WELFARE
AS AMICUS CURIAE

Statement

In its program of Aid to Families with Dependent Children pursuant to title IV, part A of the Social Security Act, Louisiana has computed the budgeted financial need of the recipients for a month, and subtracted their income. Assistance has then been paid in the amount of the budgetary deficit, but not in excess of certain maximums. In the

¹The program is referred to by Louisiana as "ADC", and that term will be used in this brief.

Title IV, part A, of the Social Security Act contains sections 401-410; the corresponding citation to the United States Code is 42 U.S.C. 601-610. The sections of title IV will not be cited to the United States Code in this brief.

present case, all of the individual plaintiffs were receiving the family maximum of \$163 per month, although their budgetary deficits were higher.

In October 1968, the Commissioner of the Louisiana Department of Public Welfare announced a 10% reduction in the amount of the ADC grants, to be effective November 1968. Thus, the individuals plaintiffs in this case would receive \$147 per month. The need for the reduction was attributed to the increase in the ADC caseload as a result of the decision of the United States Supreme Court in King v. Smith, 392 U.S. 309 (1968), which prohibited denial of ADC to otherwise eligible children because they are considered to have a substitute father.

Plaintiffs attacked the reduction, essentially on three grounds:

- 1. The lack of a corresponding reduction under Louisiana's other public assistance programs (old-age assistance, aid to the blind, etc.) denies equal protection and due process of law guaranteed by the Fourteenth Amendment and denies the protection of Federal regulations regarding determination of the amount of assistance according to statewide public assistance standards.
- 2. Since most of the families added to the ADC caseload as a result of *King* were Negro, their addition redressed prior racial discrimination, and since ADC has a larger proportion of Negroes than Louisiana's other public assistance programs, the reduction of ADC grants without a corresponding reduction under the other programs constitutes discrimination on account of race in violation of title VI of the Civil Rights Act of 1964.

- 3. Since Louisiana's action would have the effect of reducing the maximum payments received by plaintiffs, it is contrary to section 402(a)(23) of the Social Security Act, which was enacted on January 2, 1968 and requires that the Louisiana ADC plan must
 - "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

Louisiana has argued that this is a suit to compel payment of public funds from the State Treasury to plaintiffs and is barred by the Eleventh Amendment; that there is no denial of equal protection or due process; that no racial discrimination is involved; that section 402(a)(23) of the Social Security Act does not require or prohibit any action of the State prior to July 1, 1969, and that, notwithstanding this provision, the State may at any time reduce public assistance payments if its funds are insufficient.

Because of the many aspects of this case involving administration of Federal statutes for which the Department of Health, Education, and Welfare has Federal responsibility, and particularly because of the relevance of the Department's regulation interpreting section 402(a)(23) of the Social Security Act, the court invited the Department to file a brief amicus curiae.

Summary

On the question of Louisiana's reduction of ADC grants without corresponding reductions under its other public assistance programs, no views are expressed herein on the Constitutional issues. Insofar as the provisions of the Social Security Act and the implementing Federal regulations are concerned, each public assistance title of the Act provides for a separate State plan. Though there are many common features, each plan or program is separate. A change in payment in one financial assistance program, e.g., ADC, presents no question under any of the other financial assistance programs, e.g., OAA.

No views are expressed herein regarding the alleged discrimination in violation of title VI of the Civil Rights Act of 1964. This seems to be largely a question of fact as to whether there is discrimination on account of race in Louisiana's ADC program.

The Department has interpreted section 402(a)(23) of the Social Security Act as it reads. State ADC plans must provide that by July 1, 1969 certain actions will have been taken. States are not required to take such actions before that date, nor are they precluded from taking contrary actions before that date.

By July 1, 1969, however, need standards must have been updated and maximums must have been proportionately adjusted. If living costs in Louisiana have risen, the State's maximums on payments must be raised proportionately. A so-called "percentage reduction" in payments, applied to the maximums, would be an obvious circumvention of the statute, and would be contrary to the implementing Federal

regulation. The Federal regulation allows for ratable reductions in payments based on the standard of need (a method used in some States, not including Louisiana), but does not permit reductions in payments based on arbitrary maximums.

ARGUMENT

A. Louisiana's reduction in ADC payments without a corresponding reduction in its other financial assistance programs does not violate the Social Security Act or the Federal regulations.

[This argument has been deleted in printing.]

- B. Section 402(a)(23) of the Social Security Act does not require or prohibit action by the States in their ADC programs prior to July 1, 1969.
 - In view of the lack of indication of Congressional intent to the contrary, section 402(a)
 (23) should be interpreted as it reads.

Under section 402(a)(23) of the Social Security Act, a State ADC plan must

"(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

As the papers in this case indicate, much can be read into this provision. Yet, its words alone are readily understandable. They require by July 1, 1969, an updating of need standards and a proportionate adjustment of any maximums imposed by the State on the amount of aid paid. As will be developed below, for a particular State this can mean very little or a great deal, depending on the State's methods and practices for determining the amount of payment.

That this provision might mean very little in a particular State is completely consistent with its legislative history. The Congress could hardly have paid less attention to it.

The provision was enacted by section 213(b) of P.L. 90-248, 81 Stat. 898. As originally added by the Senate Finance Committee, it would have required that the States take the prescribed actions by July 1, 1969, "and at least annually thereafter." The annual feature was dropped in Conference.

Section 213(a) of P.L. 90-248 amended the "adult" titles to allow States at their option to disregard not more than \$7.50 per month of any income instead of the previous ceiling of \$5 per month. No change was made in the \$5 ceiling for ADC. In the committee reports, most of the attention was given to section 213(a).

Thus, the Senate Report, under the heading "Increasing the benefits for the aged", discussed the provision for the adult categories at some length, then added noncommittally,

"States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969 and to reprice them at least annually thereafter, adjusting the standards and any maximums imposed on payments to reflect changes in living costs." S. Rep. No. 744, 90th Cong., 1st Sess. 170 (1967).

In the summary of principal provisions of the bill, the report refers only to the provision for the adult categories, and is silent on the ADC provision. S. Rep. No. 744, 90th Cong., 1st Sess. 29 (1967).

The Conference Report, under the heading "Increasing income of recipients of assistance", reflected only the changes that had been made in Conference. On ADC, it stated

"Under the agreement, the new section 402(a) provision (for adjustments to reflect living costs) would require States to make only one adjustment before July 1, 1969, after which date the provision would not apply." H.R. Rep. No. 1030, 90th Cong., 1st Sess. 63 (1967).

The "Summary of Social Security Amendments of 1967", a Committee Print of a Joint Publication of the Senate and House Committees (90th Cong., 1st Sess., December 1967) (copy attached), referred to the contents of section 213 under the heading "Pass Along" (page 19), mentioning only the amendment to the adult categories, without any reference to the ADC provision. It is also significant, though hardly surprising, that the cost estimates on the bill as agreed to by the Conference Committee (Table 5 of the Joint Publication, page 28) did not reflect anything for section 213. Clearly, no great cost effect was anticipated.

One can speculate about what Congress may have intended by the enactment of section 402(a)(23) of the Social Security Act, in light of Administration proposals that were not enacted, other provisions of the Social Security Amendments of 1967 (P.L. 90-248), and other such remotely relevant factors. We shall discuss some of them later. But the history of section 213(b) of P.L. 90-248 itself—what the Congress did not say about it—makes it clear that such speculations are only that. Beyond the words themselves, there is no guide to the meaning and intent of section 402(a)(23), and its relationship to other provisions of title IV, part A, of the Social Security Act.

The Congress enacted a provision that could mean a little or could mean a lot, and obviously considered it hardly worthy of mention. This certainly suggests that no more should be read into the provision than the words themselves can plainly sustain. In discussing this provision in another context, a three-judge district court in Williams v. Dandridge (C.A. No. 19250 D. Md.), in a supplemental opinion filed on February 25, 1969 (copy attached), commented on the brevity of the discussion of section 213(b) in the legislative reports (p. 19), the lack of explanation of its purpose or need (p. 15, n. 8), the lack of evidence of considered judgment by the Congress as to its collateral effects (pp. 18-19), and the uncertainty as to Congressional intent (p. 20).

Against this background, we believe that, in its proper application, section 402(a)(23) should be interpreted as it reads, to carry out the intent of its words, and not some more remote and speculative purposes.

 Louisiana has until July 1, 1969, to comply with the adjustment requirements of section 402(a) (23).

Section 402(a) (23) of the Social Security Act requires that a State ADC plan must provide that "by July 1, 1969," certain prescribed actions will have been taken. On their face, these words are satisfied if the State has complied by that date. Nothing is said about what the States may do or not do before that date.

We do not disagree with the surmise of the parties as to why the date of July 1, 1969 was chosen by the Congress. In some States, compliance with section 402(a)(23) might necessitate legislation, if for example the State had a maximum on payment which was prescribed by statute. Similarly, if need standards were raised and the State made correspondingly higher payments—leaving aside, for now, the question whether the State must make higher payments—additional appropriations would be needed. By July 1, 1969, every State would have had a legislative session subsequent to January 2, 1968, the date of enactment of P.L. 90-248, and thus would have had opportunity to amend its statutes or to appropriate funds in light of section 402(a)(23).

The fact that Louisiana had a legislative session in 1968 does not mean that there was a different effective date for Louisiana. While the Congress, in setting the date of July 1, 1969, thereby allowed time for each State to have a legislative session, the statute nevertheless provides the same deadline for all States, "by July 1, 1969," irrespective of whether any particular State had an earlier legislative session or indeed could have complied without a legislative session. There is a single nationwide deadline.

When the Congress has wished to make a provision affecting the public assistance programs effective on a staggered basis according to the need and opportunity for State legislative action, the Federal statute has so provided. Section 204(c)(1) of P.L. 90-248, 81 Stat. 892; section 407 of P.L. 89-97, 79 Stat. 422.

Consequently, a judgment whether Louisiana has complied with section 402(a)(23) cannot be made until July 1, 1969. The State might take contrary actions before that date and still comply by July 1, 1969. This is not meant to suggest that a State could reduce its need standards or maximums subsequent to January 1, 1968, and then ad-

⁸ Section 204(b) of P.L. 90-248 amended section 402(a) of the Social Security Act by adding a new requirement for ADC plans. Section 204(c) (1) of P.L. 90-248 provides that:

[&]quot;The amendment made by subsection (b) shall in the case of any State be effective on July 1, 1968, or if a statute of such State prevents it from complying with the requirements of such amendment on such date, such amendment shall with respect to such State be effective on July 1, 1969"

^{*}Section 701(a) of the Economic Opportunity Act of 1964, P.L. 88-452, 78 Stat. 534, enacted August 20, 1964, imposed new requirements for State plans under the Social Security Act effective upon enactment. Section 701(b) of P.L. 88-452 had the effect of postponing the effective date until July 1, 1965, for States which were prevented by a State statute from complying with the new requirements. Section 407 of P.L. 89-97 was enacted to provide a further extension of the grace period. It reads:

[&]quot;Notwithstanding the provisions of section 701 of the Economic Opportunity Act of 1964, no funds to which a State is otherwise entitled under title I, IV, X, XIV, or XIX of the Social Security Act for any period before the first month beginning after the adjournment of a State's first regular legislative session which adjourns after August 20, 1964 (the date of enactment of the Economic Opportunity Act of 1964), shall be withheld by reason of any action taken pursuant to a State statute which prevents such State from complying with the requirements of subsection (a) of such section 701."

just only for changes in living costs which occurred in the period after such reduction. This would be an obvious evasion of section 402(a)(23). The State's action to comply must give full effect to changes in living costs since need standards were last established before January 2, 1968.

A State could choose to comply with section 402(a)(23) earlier than July 1, 1969. Since living costs continue to rise, the longer the State delays, the greater will be the rise in its need standards and maximums. This is particularly important since section 402(a)(23) provides only for a single adjustment by July 1, 1969, and did not retain the feature of subsequent annual adjustments as provided by the Senate.

We note, also, that Louisiana has not yet made its adjustment of its need standards to reflect changes in cost of living. Consequently, it is too early to know by what amount the State's maximums must be "proportionately adjusted." This further points up that Louisiana's 10% reduction in ADC payments is not part of its compliance or noncompliance with section 402(a)(23), but responds to a different problem. As will be discussed below, we believe that, in terms of compliance with section 402(a)(23), Louisiana's action would not be acceptable. But it is too early to make any judgment whether Louisiana has complied.

^{&#}x27;Moreover, the State has not yet amended its plan to include the provision, as required by section 402(a)(23), that by July 1, 1969, the required adjustments will have been made.

C. Section 402(a)(23) requires adjustment of maximums on ADC payments; it does not require or preclude ratable reductions in payments based on the standard of need.

What has already been said would dispose of the case for now, insofar as section 402(a)(23) is concerned. However, the court appears to have specifically invited our views on the validity of the Department's regulation implementing section 402(a)(23). 45 CFR 233.20(a)(2)(ii), 34 FR 1394 (1969). This requires a rather extensive excursion into some related and background matters.

The specific requirements of section 402

 (a) (23) must prevail over the general statements in section 401.

In King v. Smith, the opinion of the court stated,

"There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." 392 U.S. at 318-319 (footnotes omitted).

This is a correct general statement of the State's authority in the public assistance programs. Each of the pertinent titles of the Social Security Act requires that a State plan must contain certain provisions (e.g., section 402(a) of the Act), and the Secretary shall approve any plan which

⁸ The court's opinion made no reference to section 402(a) (23). For purposes of *King*, a general statement of the States' role was sufficient. Moreover, although section 402(a) (23) was in effect at the time of the *King* decision on June 17, 1968, the deadline of July 1, 1969 was over a year away. The implementing Federal regulation has not yet been published. The belated general awareness of section 402(a) (23) is also reflected in the supplemental opinion in *Williams* v. *Dandridge*.

fulfills these conditions (e.g., section 402(b) of the Act). With the exception of section 402(a)(23), none of these provisions limits the States in setting their need standards or level of benefits. Federal payments are made in respect to expenditures under an approved plan (e.g., section 403(a) of the Act) which are for aid to certain "needy" individuals (e.g., section 406(a) of the Act). The term "needy" is not further defined. Federal appropriations are authorized for furthering certain stated purposes by "enabling each State to furnish financial assistance . . . , as far as practicable under the conditions in such State, to needy . . . "individuals (e.g., section 401 of the Act).

Section 402(a)(23) is a striking exception to the basic statutory scheme. It is all the more striking that such a departure from the prior overall pattern of the public assistance programs and the existing Federal-State relationships was made with hardly a word of Congressional comment and with no evidence of considered judgment of the implications. This further bespeaks the need to give no greater effect to this provision than it in words commands.

Nevertheless, whatever section 402(a)(23) requires must be undertaken by the States in their ADC plans and carried out. This is a plan condition, and a failure by a State to make the commitment and implement it would present a question of whether the State plan can continue to be approved by the Secretary as being in conformity with the requirements of the Social Security Act. Louisiana suggests that, notwithstanding section 402(a)(23), it is bound to furnish financial assistance only as far as practicable under the conditions in the State. But whatever utility the statement of purpose in section 401 may have as a factor in interpreting ambiguous provisions of the Act, the

generalities of that section do not override the specific conditions set forth by the Congress for State plans. If updating standards and adjusting maximums make it necessary for Louisiana to appropriate additional State funds, this is one of the things the State must do to carry out its approved ADC plan.

Inadequate payments of assistance may result from underpriced standards of need, maximums on payments, or percentage reductions.

While a State is generally free to set its own standard of need for a public assistance program, the Federal regulations require that there must be a Statewide standard, expressed in money amounts. 45 CFR 233.20(a)(2)(i), 34 F. R. 1394 (1969). To make adequate assistance payments, a State would use a standard which includes all items needed by the recipients, priced at current levels in accordance with some recognized low-income budget. The State would then deduct income of the recipients (subject to allowable exemptions) and would make assistance payments in the amount of the remaining budgetary deficit.

Most States do not make adequate assistance payments, and this can result from one or another, or a combination, of the following factors. The State may not include all necessary items in its standard of need (or budget). The budget may be priced too low; there is much room for argument as to what is an adequate low-income budget. Or the budget may not be kept up to date, so that it does not keep pace with changes in costs.

Whatever the standard of need, the program may not have enough funds to pay on that basis. A few States simply prorate the funds. For example, if the need standard is \$100 a month, and the State pays 80% of need, an in-

dividual without other income would receive \$80 per month. For individuals with income, such States may take the stated percentage of the need standard, subtract income, and pay the deficit; or they may take the need standard, subtract income, and pay the stated percentage of the remaining unmet need or budgetary deficit. We refer to these methods as "percentage reduction." See Appendix A.

A greater number of States impose flat maximums. After computing the budgetary deficit, they pay only up to stated dollar amounts. See Appendix B. In some of these States, there is a family maximum in ADC. The full budgetary deficit is paid except that no family can receive more than the stated number of dollars; thus, small families receive their full budgetary deficit, but large families receive only the maximum. A greater number of States have maximums in ADC, in steps, for each size of family, and most of these States also have a family maximum. As may be seen from Appendix B, Louisiana's maximums, for a caretaker (parent or other relative) and varying numbers of children are as follows:

1 child — \$80 per month

2 children — \$99 3 children — 116

4 children — 133 5 children — 145

6 or more children — 163 (family maximum)

While any failure of a State to make payments on the basis of its own standard of need results in inadequate

^{*}This resume of State methods does not cover all the details of how all the States compute their ADC payments. Hopefully, it gives enough of a picture for purposes of this brief.

payments, the use of dollar maximums adds an element of arbitrariness. Family maximums, in particular, result in patently different treatment of individuals. In Williams v. Dandridge, supra, the court concluded that Maryland's family maximum in ADC denied equal protection to children in large families. See also, Collins v. State Board, 81 N.W. 2d 4 (Iowa 1957). In the present case, all of the individual plaintiffs receive the family maximum, although their budgetary deficits vary considerably. Similar relative inequity may result among smaller-sized families in Louisiana (less than 6 children) because of the maximum, but to a lesser degree.

.3. Section 402(a)(23) deals only with some aspects of pricing of need standards, and with a corresponding adjustment of maximums, and not at all with percentage reductions.

Against this background, it can be readily seen that section 402(a)(23) deals with some of the methods and procedures that are used in the computation of assistance, but not all, and then only in a partial way. The State's need standards must be adjusted to reflect fully changes in living costs since such amounts were established. In short, the standards must be updated for price changes since the last time they were priced (before January 2, 1968). This does not say that a State must use a particular price index, or must add need items which were previously omitted, or must even reflect current prices. Rather, if the need standard was last priced at \$100 in 1963 (whether or not at full current prices at that time), and living costs have since risen by 20%, the need standard must now be priced at \$120.

Maximums must be raised proportionately. Thus if, in the same State, a maximum was set at \$80 in 1963, it must now be raised by 20% to \$96.

If, however, a State had no maximums, but used percentage reductions, no change in the percentage reduction is required or precluded. If the State previously had a standard of need of \$100, and paid 80% of need, the recipient would receive \$80 per month. If the need standard were now raised to \$120 to reflect a rise in living costs, and the State continued to pay 80% of need, the recipient would receive \$96. The rise in living costs would be thus passed on to the recipient if the percentage reduction remained unchanged. It seems obvious that section 402(a)(23) does not require that a percentage reduction be "proportionately adjusted." If the percentage paid by the State also had to be raised by the rise in living costs, in the example above, the State's need standard would be raised by 20% to \$120 and the State would pay 96% of need (instead of 80%), resulting in a payment of \$115 (instead of \$80), a rise more than double the 20% rise in living costs. In some States, such an adjustment in the percentage reduction could require payment of more than 100% of need. In short, it appears that section 402(a)(23) just does not refer to percentage reductions. It does not require that they be adjusted, or that they remain the same, nor does it preclude changes in their amount.

The fact that section 402(a)(23) does not affect percentage reductions allows States to retain considerable flexibility as to the amount of their assistance payments. We return to our example where a State with a need standard of \$100 paid 80% of need, and the recipients received \$80. Because of a 20% rise in living costs, the State's need

standard is raised to \$120. Such a State could now pay 66-2/3% of need, and the recipients would still receive \$80. Or the State could pay 100% of need, or 80%, or 50%, according to the available funds. States which formerly paid 100% of need might now change and pay a lesser percentage. States with a system of maximums might in addition compute payments on the basis of a percentage of need.

These options, if used by a State, might offset in part what would otherwise be the effect of section 402(a)(23). But they would not be contrary to section 402(a)(23). The language and the legislative history of that provision are completely consistent with its having only modest results, if the State so chooses.

We would emphasize that section 402(a)(23) would not thereby be nullified. It would have some significant effects. If the need standard is raised to reflect higher living costs, additional individuals become eligible for ADC. In our example, if the need standard goes from \$100 to \$120, more individuals with income will now be eligible. They will receive small assistance payments, and also medical care (under the State's title XIX plan in most States) and a variety of social and rehabilitative services. In addition, the updating of the need standards will make the standards more realistic in light of current conditions. This will give important information about the needs of assistance recipients to State agencies, State legislators and officials, and the public. In those States using maximums, the maximums will be raised, directly benefiting the recipients whose payments are limited by the maximums. To the extent that States with inadequate funding of their public assistance programs turn to percentage reductions rather than maximums, there will be a more equitable system of

distributing the funds, without the arbitrariness of the maximums. At the least, section 402(a)(23) will have some marked effects in the ADC programs of the several States.

4. That section 402(a)(23) leaves some flexibility to the States in determining the amount of ADC payments is consistent with the language of that provision, its legislative history, and other aids to statutory construction.

To this point, in explaining what we believe to be the proper construction of section 402(a)(23), we have referred only to those factors which we believe are necessary, at a minimum, for an understanding of that provision. But there are many other factors which, in combination, reinforce our conclusion that while section 402(a)(23) imposes requirements that will have significant effects on State ADC programs, nevertheless the States are left with flexibility to distribute their funds, if inadequate, among the recipients on an equitable basis (through percentage reductions) even though this might mean that a rise in need standards to reflect higher living costs might not result in higher payments to the recipients. In this section of the brief, we shall discuss the various factors together.

a. The internal language of section 402(a)(23).

We have already indicated our view that the word "maximums" in section 402(a)(23) refers to dollar maximums and not to percentage reductions. The requirement that "any maximums that the State imposes on the amount of aid paid to the families will have been proportionately adjusted" is readily applicable to dollar maximums but, as pointed out above, makes no sense when applied to percentage reductions.

We also note that the term "maximums" has been used over the years in the public assistance programs to refer to dollar maximums. Enclosed is a copy of "Characteristics of State Public Assistance Plans under the Social Security Act, General Provisions—Eligibility, Assistance, Administration," Public Assistance Report No. 50, 1964 ed. For each State, Item 9 on "Assistance and services provided" contains an entry under "Maximum money payment to recipients." These entries refer in all cases to dollar maximums. Appendix B to this brief is an updating of this item of the "Characteristics." It is noteworthy that the information in Appendix A to this brief, dealing with percentage reductions, was collected in a special study, and not as a part of the ongoing effort to have current information on "maximums" for the "Characteristics."

We could multiply instances where the term "maximums" has been used to refer to dollar maximums, as contrasted with, or exclusive of, percentage reductions. We do not maintain that there has never been confusion about the two methods, or that the term "maximums" has never been used to refer to both methods. However, in official publications of this Department, including the "Characteristics," "maximums" has meant dollar maximums.

b. Legislative history of section 402(a)(23).

We have already recounted in full the meager legislative history of section 402(a)(23). Congress paid scant attention to this provision. No specific cost was assigned, indicating that no great cost was expected. These factors suggest that an expensive requirement was not being imposed on the States mandatorily.

Plaintiffs argue that section 402(a)(23) should be interpreted in light of other proposals which were not enacted. However, their nonenactment would suggest that we should look rather to what the Congress did enact. In any event, these abortive proposals are readily distinguishable from section 402(a)(23). One is struck by the differences rather than any similarities.

The Administration proposal for the "Social Security Amendments of 1967" (H.R. 5710, 90th Cong., 1st Sess.) contained a requirement whereby in all the programs providing for subsistence payments the States would be required, effective July 1, 1969, to meet full need under their standards, and, effective July 1, 1968, to review the standards annually and, to the extent prescribed by the Secretary, update them to take into account changes in living easts. Section 202 of H.R. 5710. A separate appropriation of \$60,000,000 for each fiscal year beginning with 1970 was authorized for additional Federal payments to States to meet the non-Federal share of cash assistance expenditures occasioned by certain provisions of H.R. 5710. Section 206. Among these provisions was section 202. Thus, H.R. 5710 was clear and specific as to what the States must do by way of making payments in ADC and the other titles, and specific recognition was given to the resulting added costs to the States. In addition, it was estimated that it would cost the Federal government an additional \$150 million annually if all States made assistance payments on the basis of meeting full need as they themselves define it. An additional \$100 million would be needed for States to bring their need standards up to 1967 prices. Hearings before the Committee on Finance, U. S. Senate, 90th Cong., 1st Sess., on H.R. 12080, p. 254. For ADC alone, the total costs

for fiscal year 1970 were estimated at \$95 million for requiring that cash payments meet full need under State standards and an additional \$90 million for requiring States to update their standards. Senate Hearings on H.R. 12080, pp. 721-2.

The "Social Security Amendments of 1967" as passed by the House (H.R. 12080, 90th Cong., 1st Sess.) contained no provisions along these lines. The Administration renewed its request for these provisions before the Senate (Senate Hearings on H.R. 12080, pp. 255-260, 634-637), and again did not meet with success.

As passed by the Senate, section 213(a) of H.R. 12080 would have amended the adult categories to require that each recipient would have an increase of \$7.50 per month in his total amount of assistance and other income. This was primarily intended to assure that the increase being made by H.R. 12080 in old-age, survivors' and disability insurance benefits would be passed along to those beneficiaries who received public assistance, and would not result merely in an offsetting reduction in public assistance. While the statutory provision spoke of need standards and

assistance must be "effective July 1, 1968, provide that the standards used for determining the need of applicants and recipient for and the extent of such assistance under the plan, and any maximum on the amount of assistance, will be so modified that an increase in the amount of assistance and other income will be no less than \$7.50 per month per individual (determined on an average per individual in accordance with standards prescribed by the Secretary) above such amount of assistance and other income available under the standards and maximum applicable under the plan on December 31, 1966 (as of June 30, 1966, if the State plan includes provisions for automatic cost-of-living adjustments in assistance under such plan);".

maximums, the key language is a direction that "an increase in the amount of assistance and other income will be no less than \$7.50 per month per individual." The desired result was clearly specified. In absence of this language, the meaning of the references to need standards and maximums would have been just as murky as has been discussed in relation to section 213(b) of P.L. 90-248.

Most ADC recipients would not benefit from the increase in old-age, survivors' and disability insurance benefits. For them, the Senate provided an annual updating of need standards to reflect changes in living costs and a proportionate adjustment of maximums. Though there were superficial resemblances to some words and provisions in the Administration's original proposals and in section 213(a), section 213(b) lacked the specification of results that was found in these other proposed amendments. This does not appear to have been an accident. While neither the Senate nor the Conference gave any real indication of its intent, section 213(b) seems to represent in part an attempt to avoid the appearance of doing nothing in the ADC program. It was a gesture of uncertain meaning and effect, suggesting on its surface something more than it actually required on closer inspection.

It also seems quite significant that when the amendment was proposed on the Senate Floor to add a provision to section 213(b) to require an increase in payment of \$4 per month for each ADC recipient, corresponding to the \$7.50 per month increase for each recipient in the adult programs, the amendment was rejected without even a division or the yeas and nays. It was estimated that this amendment would cost \$79.4 million annually in Federal funds and \$135.6 million annually in non-Federal expendi-

tures. 113 Cong. Rec. 16963-4, Nov. 21, 1967 (daily ed). Thus, the Senate was unwilling to require what would be an actual cost-of-living increase of \$4 per month, and the bill retained only the vague suggestion of an increase contained in section 213(b). Senator Long, the Chairman of the Finance Committee, spoke against the amendment, exphasizing that it would require the States to find money they did not have. Senator Kennedy of New York expressed his disappointment that the amendment was not considered with more care, since it was designed to erase a serious discrimination in the bill. The Senators seem to have understood clearly that the requirements of section 213(b) did not guarantee that ADC recipients would actually receive increased payments.

In the Conference, as previously recounted, the \$7.50 per month mandatory increase in the adult categories was changed to a provision, optional with the States, for disregarding not more than \$7.50 per month of income instead of \$5. In the ADC proposal, there was less to make optional with the States. Even so, the requirement for annual updating of need standards was dropped. States would be required "to make only one adjustment before July 1, 1969, after which date the provision would not apply." H.R. Rep. No. 1030, 90th Cong., 1st Sess. & (1967).

c. Other aids to statutory construction.

When we range further in search of meaning for section 402(a)(23), the clues become less precise. Thus, defendants argue that section 401 limits their liability for financial assistance to what is practicable under the conditions in the State. Plaintiffs might counter that the purpose of

the ADC title is to furnish financial assistance. Similarly, it could be pointed out, for defendants, that the Social Security Amendments of 1967 for the most part embodied the views of the House rather than the Senate. H.R. 12080, as passed by the House, omitted any provision like section 213; the Conference made section 213(a) optional rather than mandatory, and presumably would have further softened section 213(b) had it imposed any serious requirement on the States. This view has been countered by the argument that the 1967 Amendments were generally onerous from the point of view of the recipients, and section 213(b) was intended at least to give them a cost-of-living rise in payments. Thus, the arguments range from the speculative to the fanciful.

We believe, however, that two points are of some significance. First, section 213(b) was a departure from the settled principle under the public assistance titles that the standard of need and the level of benefits were matters within the State's discretion. While section 213(b) made a definite exception to this principle, we submit that, in absence of any evidence of considered judgment by the Congress of the implications, this provision should be applied in accordance with its words, and not more broadly.

In addition, we note that section 213(b), as finally enacted, called only for a one-time action by July 1, 1969. This presents a problem as to how long the State's action must be sustained. Forever? Five years? One year? Less? If the States had been required to reprice their standards every year, it would have been clear that no backsliding was to be allowed. But a one-time action to meet conditions at a specified date is soon overtaken by

the press of later developments. There is no indication that the Congress was imposing an immutable, permanent adjustment of payments, regardless of the condition of the State's ADC program or the State's financial condition. This, in turn suggests that, in 1969 itself, room was being left for the play of these factors. Standards would be updated and maximums adjusted, but the State's flexibility in operating within the available funds was otherwise left unimpaired.

D. The implementing Federal regulation, 45 CFR 233.20(a)(2)(ii), is completely consistent with section 402(a)(23) of the Act.

The Federal regulation implementing section 402(a)(23) reads as follows:

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a)(2)(ii), 34 F.R. 1394 (1969).

We believe that this regulation is completely consistent with the provisions of the Social Security Act as heretofore explained in this brief.

The first sentence of the regulation virtually repeats the language of section 402(a)(23), and echoes the requirement of the Social Security Act that State ADC plans must contain the prescribed condition on updating need standards and adjusting maximums by July 1, 1969. Reference is made to the State's standard of assistance, the terminology used in the regulations, instead of the statutory reference to the amounts used by the State to determine the needs of individuals.

The second sentence of the regulation deals with the undating of the State's standard of assistance. Over the past few years, States have been simplifying their methods of determining the amount of assistance payments. Contributing factors have been Federal urging (see 45 CFR 233.20(a)(2)(iv)), and the general movement toward simplifying methods of determining eligibility for assistance. If a State last priced its assistance standard several years ago, and now is simplifying its standard as well as repricing it, question may arise whether the content of the new standard is equivalent to that of the old, and whether the elimination of items or the combination of items in the standard results in a contraction in the content of the standard that offsets in whole or in part the adjustment of prices to reflect changes in living costs. The second sentence of the regulation seeks to foreclose this possibility and to assure that the repricing will apply to at least the same scope of items as the previous pricing before January 2, 1968.

The third sentence of the regulation deals with the problem faced by States which update their standards and adjust their maximums, but are faced with inadequate funds to meet the cost of their ADC programs. For many reasons, not excluding court decisions, ADC caseloads have been rising dramatically and unpredictably. Actual costs have outstripped estimates by a considerable margin, both Federally and in the States. The Congress has respected the "open-end" appropriation feature of the public assist ance programs. Many States, however, do not have a comparable feature, and limit their appropriations. Some Legislatures may make inadequate appropriations; other may make appropriations which are adequate on the basis of estimates, but which turn out to be insufficient. Some States do not make supplemental appropriations for public assistance; whatever is appropriated must do, often for a biennium.

In all of these situations, unless section 402(a)(23) is far more revolutionary than we believe there is any reason to suppose, the State welfare agencies may make downward adjustments in the amount of ADC payments. Section 402(a)(23) forecloses doing this by reducing the assistance standard or the maximums. While we have reiterated our view that section 402(a)(23) means no more than it says, we believe equally that it does mean what it says. The pricing of the assistance standard must be updated and the maximums must be adjusted. To make these changes and then reverse them because of inadequate funds would fy in the face of the statutory requirement, and cannot be accepted.

The method that is left open to the States is to make ratable reductions, i.e., percentage reductions applied to

the standard of assistance (before or after the subtraction of income). The cross-reference in the third sentence of the regulation to 45 CFR 233.20(a)(3)(viii) is merely a reminder that such a reduction must be applied Statewide. The latter provision states:

"Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide."

We note, in passing, that this provision, too, makes a verbal distinction between reduction of payments because of "maximums" and because of "insufficient funds." While maximums often result from insufficient funds, they have an independent arbitrary aspect which may limit payments even where funds are otherwise adequate. It is these maximums, and this method of dealing with inadequate funding, to which we believe that section 402(a)(23) is solely directed. We submit that, in the light of the words and history of section 402(a)(23), the third sentence of the Federal regulations, permitting ratable reductions in relation to the standard of assistance, is not merely reasonable, but is inescapably compelled.

The fourth sentence of the regulation is an attempt to avoid the very kind of misunderstanding that may have arisen in this case. It is meant to emphasize that maximums must indeed be proportionately adjusted in relation to the repriced standard of assistance. Because of the reference in the third sentence to the permissibility of ratable reductions, and the cross-reference to section 233.20(a)(3)(viii), which indicates that maximums can be adjusted if funds

are inadequate, it was anticipated that some States might conclude incorrectly that they could adjust their maximums in relation to the repriced standards, then turn right around and reduce the maximums because of inadequate funda. The fourth sentence was intended to forestall this confusion, and to make it clear that the requirement of adjustment of maximums was not intended to be qualified by the third sentence and its cross-reference. If funds were inadequate, ratable reductions could be made in relation to the standard of assistance, not in relation to the maximums.

It hardly needs saying that the Federal agency strongly recommends that States pay assistance in full on the basis of current standards. The regulation, however, deals with what is required by section 402(a)(23), and what States may or may not do under that section.

E. Louisiana has not yet purported to comply with section 402(a)(23), and the July 1, 1969 deadline for compliance has not arrived. A reduction in ADC payments, applied to Louisiana's maximums, would not be in compliance with section 402(a)(23).

The application of the foregoing discussion to Louisiana's situation seems clear. Louisiana has not purported to comply as yet with the requirements of section 402(a)(23). The State has not submitted an amendment to its ADC plan, undertaking the commitment prescribed in the Social Security Act. So far as we are aware, the State has not after January 1, 1968, repriced its standard of assistance to reflect changes in living costs since the previous repricing. Until this is done, the amount of the required propor-

tionate adjustment in Louisiana's maximums is not even known.

The July 1, 1969, deadline for compliance with section 402(a)(23) has not yet arrived. It is too early to make any judgment whether Louisiana has failed to comply. The State could act earlier, but has not claimed to do so. In this situation, the State is free until July 1, 1969 to distribute its funds in accordance with the Social Security Act and the implementing Federal regulations without regard to section 402(a)(23).

This does not excuse Louisiana from complying with section 402(a)(23) by July 1, 1969, nor does it lessen in any way what Louisiana must do to comply with that section. If Louisiana has reduced ADC payments by 10% so that a family which would have received the maximum payment of \$163 per month receives \$147 instead, the maximum figure which must be proportionately adjusted in response to section 402(a)(23) would still be \$163. A State cannot reduce its maximum after January 1, 1968, and then adjust the reduced maximum. This would be an obvious evasion of section 402(a)(23) and would not constitute compliance with that section.

When Louisiana does seek to comply with section 402(a) (23), it cannot have a reduction in payments in the manner specified in the State agency's Memorandum No. 68-163, October 9, 1968 and Memorandum No. 68-169, October 15, 1968. Even if Louisiana's ADC funds are inadequate, the State will not be able to have a percentage reduction of its payments. For families receiving payments which are limited by the maximum, such a reduction in payment is a direct reduction of the maximum. To adjust maximums on

the one hand and to reduce them on the other would be an outright nullification of, and failure to comply with, the requirements of section 402(a)(23), and would not constitute compliance with that section. A reduction of this kind is not what is meant by a ratable reduction in the third sentence of the Federal regulation or by a percentage reduction in the discussion in this brief. The allowable reductions there referred to would be applied in relation to the standard of need and not in relation to payments which had already been limited by arbitrary maximums. The fourth sentence of the Federal regulation is designed to preclude reductions applied to maximums.

We assume for now that Louisiana will comply with section 402(a) (23), and that its ADC funds will be sufficient for payments on the basis of the updated standard of assistance and the proportionately adjusted maximums.

CONCLUSION

In this brief, we have discussed only those aspects of this case which involve provisions of the Social Security Act and the implementing Federal regulations. We have not expressed any views on the constitutional issues or the applicability of title VI of the Civil Rights Act of 1964.

We have concluded that, at the present time, Louisiana's 10% reduction in AFDC grants does not violate any provision of the Social Security Act or the Federal regulations. The fact that Louisiana has not reduced payments under any of its other public assistance programs does not raise any question. Each State plan or program is judged on its own for conformity with the requirements of the Act and the Federal regulations.

Looking at Louisiana's ADC program by itself, we note that, in general, the level of payments is a matter within the State's discretion. This general principle has been qualified by enactment of section 402(a)(23) of the Act, but that provision requires only that the State take certain actions by July 1, 1969. This deadline has not yet arrived, and Louisiana has not purported to comply. Therefore, it is too early to judge whether Louisiana has complied with section 402(a)(23). There is nothing in the language or history of that provision which precludes Louisiana from reducing ADC payments at the present time, but such a reduction does not lessen what Louisiana must do to comply with the statutory requirements by July 1, 1969.

To comply with section 402(a)(23), a State must update its standard of assistance (or standard of need, or budget) for the ADC program to reflect fully changes in living costs since the standard was last priced before January 2, 1968. In addition, any maximums which the State imposes in its ADC program must be proportionately adjusted. However, if the State cannot meet need in full under the adjusted standard, it may make ratable (or percentage) reductions in relation to the standard of need (either before or after income of the family is deducted). Nevertheless, the State may not make ratable reductions of its payments which have already been limited by arbitrary maximums. This would be an evasion of the requirement that maximums must be adjusted proportionately to the adjustment of the standard of assistance. Accordingly, a reduction such as that made by Louisiana in its ADC payments, which was applied to the maximums rather than to the standard of need (or the budgetary deficit), would not be in compliance with section 402(a) (23).

Hitherto, under the provisions of the Social Security Act and the division of authority between the Federal and State agencies in the administration of the public assistance programs, the States have been free to set their own standards of assistance and level of benefits. Contrary to Louisiana's argument, section 402(a)(23) is an exception to this general principle and States must comply with the requirements of repricing their standards and adjusting their maximums by July 1, 1969. However, contrary to plaintiffs' argument, section 402(a)(23) means only what it says, and leaves the States free to use other mechanisms (i.e., ratable reductions) for determining the level of benefits, even though as a result the repricing of standards may not be fully passed on to ADC recipients in the form of proportionately adjusted payments.

The conclusion that the proportionate adjustment of maximums does not preclude ratable reductions results inescapably from an examination of all relevant factors—the internal language of section 402(a)(23), the legislative history of that provision, and the latitude otherwise allowed to the States in determining the standard of need and level of benefits. Section 402(a)(23), when applied as it reads, has significant effects on the ADC program, and encourages a cost-of-living increase in ADC payments by

July 1, 1969. It does not, however, guarantee such an increase.

Respectfully submitted,

LOUIS C. LACOUR
United States Attorney
Eastern District of Louisiana

Of Counsel:

St. John Barrett, Acting General Counsel
Joel Cohen, Assistant General Counsel
Myron Berman
Frances White
Department of Health, Education, and Welfare

[Appendices A and B omitted in printing]

H.E.W. Brief in Jefferson, et al. v. Hackney, et al.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION No. CA-3-3012-B

RUTH J. JEFFERSON, et al.,

Plaintiffs,

v.

BUBTON G. HACKNEY, et al.,

Defendants.

BRIEF OF ROBERT H. FINCH
SECRETARY OF HEALTH, EDUCATION, AND WELFARE
AS AMICUS CURIAE

A-40

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I. Statement

The case under consideration involves a complaint filed by recipients of aid to families with dependent children (AFDC) against the Texas Department of Public Welfare, and certain employees of that Department, which administers the aid program. The complaint arose from an administrative action by which payments to recipients in the program were reduced. The program for aid to needy families with dependent children consists of cooperative efforts of the federal and state governments as contemplated in Part A of Title IV of the Social Security Act. 42 U.S.C. § 601 to § 610.

The Social Security Act sets forth certain requirements to which individual states must respond if they are to avail themselves of federal financial participation in their programs of aid to families with dependent children. Federal administration of the pertinent part of the Act rests with the Secretary of Health, Education, and Welfare. Regulations promulgated by the Secretary afford further guidance and direction to the participating states with respect to the meaning and intent of Congress as expressed in Title IV of the Social Security Act.

Complainants allege: that Article 3, Section 51a of the Constitution of the State of Texas denies them equal protection of the laws as required by the Constitution; that actions of the Texas Department of Public Welfare in reducing benefits are based upon race or ethnic discrimination and contravene the Constitution of the United States; that reduction of benefits in the absence of legal, reasonable or rational standards constitutes a taking of

property without due process of law as required by the Constitution of the United States, that reduction of benefits by the Department of Public Welfare violates the Social Security Act; and that Article 3, Section 51a of the Constitution of the State of Texas is contrary to both the Social Security Act and the Constitution of the United States.

We call to this court's attention the fact that there are two cases in which decisions have been issued which deal with certain of the substantive issues in this case.

The first, Lampton v. Bonin, was heard by a three-judge Federal district court in New Orleans. That case involved percentage reductions of assistance payments in the State's program of Aid to Families with Dependent Children prior to July 1, 1969, without any comparable cuts in its public assistance programs for various categories of needy adults, and aisc included a challenge to the Federal regulation implementing section 402(a)(23) of the Social Security Act (42 U.S.C. 602(a)(23)), which specifically permits certain percentage reductions. The Department of Health, Education, and Welfare submitted an amicus brief (copy attached as Exhibit A) which addressed itself to the two issues described above. The district court, in a 2-1 decision (copy attached as Exhibit B) held that the State's various public assistance programs authorized by separate titles of the Social Security Act were independent of each other, and that differences in payment from one program to the next did not deprive persons of the equal protection of the laws. The majority held that the question of whether section 402(a)(23) permitted a State to make certain percentage reductions after July 1, 1969, and the related question of whether HEW's regulation

permitting such action were valid, was not ripe for adjudication. The court retained jurisdiction so that, depending upon the action of the Louisiana legislature and State welfare agency, it could decide these questions if it should become necessary. The dissent was of the view that the case could be adjudicated, and concluded that Louisiana could not adopt percentage reductions and that HEW's regulation was invalid. This opinion will be discussed at greater length below.

The second case which considered related questions is Rosado v. Wyman, in the Eastern District in New York. New York State enacted legislation which, effective July 1, 1969, would have replaced its previously highly individualized standards of need (including extensive schedules of special need items and variations according to ages of children in the family) and full payment of that standard, and would have provided for a flat statutory maximum on grants according to the size of the family.

The district court entered a preliminary injunction against the State welfare agency, enjoining them from taking irreversible action to implement the new law. In order to assist the Court of Appeals, should an interlocutory appeal be taken, the court set out its tentative conclusions which supported the injunction. It concluded, in a lengthy opinion (copy attached as Exhibit C) that because the new law resulted in lower payments to a substantial number of recipients, it was inconsistent with section 402(a)(23), and the court also expressed its opinion, relying heavily on the Lampton dissent, that the Federal regulation permitting certain percentage reductions was also invalid for the same reason. This opinion will be discussed at greater length below.

This brief amicus curiae is filed in response to the request of the court and describes the Secretary's position on the following issues: (1) the separateness of the various public assistance titles of the Social Security Act and the State programs operated pursuant thereto; (2) the Department's interpretation of section 402(a)(23) of the Social Security Act, as evidenced by its implementing regulation; and (3) the validity under the Social Security Act of the implementation by the Texas welfare agency of section 402(a)(23). This brief will also comment on these portions of the Lampton dissent and the Rosado opinion which conflict with the Secretary's interpretation of section 402(a)(23). No comment was sought or is made relative to those issues arising under the Constitution of the State of Texas or the Constitution of the United States.

II. Argument

A. The provision by a State of grants in its AFDC program which are lower than these provided in its other Federally-funded assistance programs does not violate the Social Security Act.

[This argument has been deleted in printing.]

B. Section 402(a)(23) of the Social Security Act does not require increased assistance payments in the AFDC program.

Under section 402(a)(23) of the Social Security Act, State AFDC plans must

"(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The implementing Federal regulation reads as follows:

"In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established. and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards." 45 CFR 233.20(a)(2)(ii). 34 F.R. 1394 (1969).

In essence, for purposes of this case, the regulation requires that a State must update its standard of assistance for the AFDC program to reflect changes in living costs, and any dollar maximums imposed by the State on AFDC payments must be proportionately adjusted. If the State's funds are insufficient to meet need in full under the adjusted standard of assistance, the State may make percentage reductions in payment in relation to the adjusted standard (not in relation to any dollar maximums).

The plaintiffs, the Lampton dissent, and the Rosado decision take the position that section 402(a)(23) requires that standards must be updated and payments must be proportionately increased. In their view, to allow a State to introduce percentage reductions or to lower the percentage where such a reduction method is already in use nullifies the effect of section 402(a)(23) and is contrary to the Act.

We submit that the Federal regulation is completely in accord with the words of the statute and the intent of the Congress in enacting it.

1. The words of the statute.

The Lampton dissent, upon quoting section 402(a)(23), observes at once that "this statute requires the states to increase ADC payments" (p. 2). This is the premise and the essence of the entire dissent. The Rosado decision, similarly, states at the beginning of its discussion of the meaning and effect of section 402(a)(23) that this provision requires that the "level of benefits" be adjusted to reflect changes in living costs (p. 46). Thus, both of these opinions essentially view section 402(a)(23) as if it read:

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and [any maximums that the State imposes on] the amount of aid paid to families will have been proportionately adjusted. [Deletion bracketed.]

Had the Congress wished to require that payments must be increased proportionately to the rise in living costs, it obviously would have deleted the bracketed words, or otherwise expressed the intended result. Instead, section 402 (a)(23) requires that "maximums" on payment be adjusted, but very definitely does not require that all payments must be increased, or that the level of benefits must be increased.

Both the Lampton dissent and the Rosado opinion appear to recognize the distinction between standards of assistance on the one hand and payment on the other. Thus, any requirement for increase in payment must be found in the latter part of section 402(a)(23), which speaks of "maximums." Both these opinions take the view that the term "maximums" in some way includes percentage reductions. Yet both opinions seem to agree that the words of the statute do not make sense when applied to percentage reductions. If a State has a percentage reduction, and updates its standard of assistance, the increase will be passed along to the beneficiaries if the percentage reduction remains the same. If the percentage reduction were "proportionately adjusted", the result would be an increase in payment much greater than the increase in living costs. Lampton brief, Exhibit A, pp. 20-21; Lampton dissent, Exhibit B, pp. 15-16 and footnote 17; Rosado opinion, Exhibit C, pp. 54-55, 57-58.

The term "maximums" has had a rather settled meaning in the public assistance programs as applying to dollar maximums. Lampton brief, Exhibit A, pp. 23-24; Rosado opinion, Exhibit C, p. 49.

Without further belaboring the point, it seems perfectly clear that the words of section 402(a)(23) require only an adjustment of maximums. They do not require an adjust-

ment of payments. They do not require or preclude any change in relation to percentage reductions.

2. The intent of the Congress.

The Lampton dissent and the Rosado opinion, in effect, take the view that the statute should not be read literally, since this would give results contrary to the intent of the Congress in enacting the provision. We submit that the clearest evidence in this regard is the virtual silence of the Congress about the meaning of section 402(a)(23), thus leaving the words of the provision to speak for themselves. Moreover, such more remote aids to construction as exist point to the same result as does a literal reading of the provision, namely, that the Congress did not impose upon the States a mandatory requirement that AFDC payments must be raised.

a. Direct legislative history.

As set forth in HEW's Lampton brief, Exhibit A, pp. 9-11, the legislative history of the enactment of section 402(a)(23) gives no amplification of what the Congress may have intended. This provision was contained in section 213(b) of P.L. 90-248. The committee reports concerned themselves almost exclusively with section 213(a), a relatively minor amendment to the programs for the aged, blind and disabled. The committees apparently considered section 213(b) to be of even less moment. The court is Williams v. Dandridge (D. Md.), opinion of February 25, 1969, (this opinion appears as an attachment to the Lampton brief) discussed at some length (pp. 15-20) the lack of Congressional explanation about section 402(a)(23).

b. Other proposed amendments on related subject matter. Cost factors.

The Rosado opinion discusses in detail other proposals for amendment of the public assistance titles on the subject of need standards, cost of living, and amount of payment. The opinion concludes that section 402(a)(23), as proposed by the Senate, was a compromise. Exhibit C, p. 51. However, while section 402(a)(23) deals with some of the same subjects as the other proposals, the differences are much more striking than the similarities. For one thing, the other proposals were not enacted; the present section 402(a)(23) is what the Congress voted. The other proposals were explicit as to their effect on payments. Moreover, the resulting costs were recognized to be sizable, and provision was made for meeting these costs. When section 402(a)(23) was enacted, the cost estimates did not reflect anything for this provision. Lampton brief, Exhibit A, pp. 10-11, 24-26.

Perhaps most striking was the refusal of the Senate to enact an actual cost-of-living increase in payment of \$4 per month for each AFDC recipient. It was estimated that this amendment would cost \$79.4 million annually in Federal funds and \$135.6 million annually in non-Federal expenditures. The Senate was unwilling to impose this financial burden. Quite clearly, the Senators seem to have understood that the proposed section 402(a)(23) did not guarantee that AFDC recipients would receive increased payments. Lampton brief, Exhibit A, p. 27.

c. Section 402(a)(23) as an exception to State options on level of payments.

This specific plan requirement for adjusting need standards and any maximums which a State might impose

must be considered in the context of the general principles applicable to standards of need and amount of payment in the public assistance programs.

"There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." King v. Smith, 392 U.S. 309, 318-319 (1969).

Prior to the enactment of section 402(a)(23) this statement was true without exception. There is nothing in the legislative history of that section to indicate that the Congress intended to withdraw from the States their basic authority to determine the total expenditure they wished to make for AFDC. Therefore, the fact that section 402(a)(23) clearly represents a departure from the traditional Federal-State allocation of authority provides all the more reason to give effect only to its clear and unambiguous command. Any further derogation of a clear and long-established principle, recognized and accepted by the Supreme Court, would hardly be warranted without statutory text or clear legislative history to support such action.

d. The role of legislators and States.

If section 402(a)(23) did in fact inescapably require States to increase the level of AFDC payments, this would

¹ The court's opinion made no reference to section 402(a)(23). For purposes of *King*, a general statement of the States' role was sufficient. Moreover, although section 402(a)(23) was in effect at the time of the *King* decision on June 17, 1968, the deadline of July 1, 1969 was over a year away. The implementing Federal regulation had not yet been published. The belated general awareness of section 402(a)(23) is also reflected in the supplemental opinion in *Williams* v. *Dandridge*.

have necessitated large expenditures of additional Federal, State and local funds. If the estimates for the \$4 per recipient increase which the Senate turned down are applicable here, the total cost would be in excess of \$200 million dollars, with almost two-thirds of this amount in non-Federal funds. A required outlay of this magnitude, in derogation of the usual latitude of the States to set their own level of benefits, would, in normal course, have resulted in remonstrances from some States, and opposition by various Congressmen. In short, section 402(a)(23) would have become very controversial. The fact that it was given almost no attention reinforces the conclusion that it was not viewed as imposing on the States the expense of actually increasing AFDC payments.

3. The Federal interpretation.

In this context, the deference to be given the Federal interpretation of the statute is particularly pertinent. We are dealing with a statute with words that are clear on their face, and which raise doubt only because they accomplish a limited result. It is not unnatural to wonder whether the Congress did not intend more. The Federal agency, which perforce worked closely with the Congressional committees, with the individual Representatives and Senators, with the States and with all the other individuals and organizations involved in the legislative process, is in a position to know which provisions were considered important and far-reaching and which were of lesser significance.

In the present case, this involvement of the Federal agency in the legislative process served only to reinforce the conclusion derived from the words of section 402(a) (23), from the absence of direct legislative history, and

from the effect of the other factors which we have been discussing in section II-B of this brief. Congress meant what section 402(a)(23) says, and no more than that. This is not a case where the Federal regulation is alleged to go beyond the words of the statute. Rather, the complaint is that it does no more than the words of the statute require. In such a situation, the fact that the Federal agency did not seek to impose any greater burden on the States than the Congress did deserves particular respect.

Both the Rosado opinion and the Lampton dissent state that HEW's regulation is contrary to the intent of the statute. But that begs the question. In the absence of direct legislative history, the intent of the statute is unclear. Deference is due to the Federal regulation when it carries out the words of the statute, which are further supported by the Federal agency's understanding that these words, taken literally, indeed represent the intent of the Congress.

C. The Texas plan amendment is consistent with the Social Security Act and the implementing regulation.

The case which is currently before this court for decision presents a concrete factual situation. Thus, the court can consider section 402(a)(23), as interpreted by HEW in its implementing regulation, and the results which flow from that interpretation as evidenced by the new policies recently adopted by the Texas welfare agency.

Neither the Rosado nor the Lampton case presented an actual instance in which a State had updated its standard of need and then, because of limitations on its resources, effected a percentage reduction of that standard in order to determine actual payments. This lack of a concrete case was the precise reason why the majority in Lampton de-

elined to adjudicate the question of what courses of action were available to Louisiana consistent with the Social Security Act. In Rosado, while it is true that the legislature had acted prior to the initiation of the suit, the challenged action did not involve the percentage reduction of an adjusted standard of need in order to compute actual payments. Rather, the New York legislation imposed flat dollar maximums. The court itself recognized that this was the case and stated: "The validity of the escape route for section 402(a)(23) [the "ratable" or percentage reductions] supplied by the regulation is thus technically not before the Court." Exhibit C, pp. 56-57.

Because Texas has at this point taken the necessary action in response to section 402(a)(23), and its policies have been submitted to HEW as an amendment to its AFDC plan and have been approved by the Federal agency, it is possible in this case to describe with specificity the effect of the plan amendment on the plaintiff-AFDC beneficiaries and demonstrate the affirmative results which result therefrom under the Federal agency's interpretation of section 402(a)(23).

The Texas plan amendment effectuating section 402(a) (23) is attached as Exhibit D. It was issued by the defendant Commissioner, State Department of Public Welfare on February 28, 1969, as "Office Memorandum E-430" and became effective May 1, 1969. This issuance contains instructions to field staff and reflects the following significant changes in the plan:

1. An 11% upward adjustment is made in the State's standard of need to reflect increases in the cost of living (Exhibit D, p. 4).

- 2. The flat dollar maximums on the amount which could be paid to families are abolished (Exhibit D, p. 6).
- 3. Directions are given pertaining to the computation of assistance payments in AFDC (Exhibit D, pp. 5-6). The family's total needs are computed according to the prescribed standard. Then, the amount of full need is multiplied by the percentage of need which the State will meet. The same percentage is applied in all AFDC cases, regardless of the size of the family. This operation gives a figure termed "recognizable needs." Any net income the family may have is next deducted (subject to certain limited Federal and State provisions on exemption of income not in issue here) and the resulting figure represents the assistance payment which the State will make.

As stated above, E-430 has been approved by HEW as meeting the requirements of Federal law and regulations. This policy, which incorporates a percentage reduction which is understood to be 50% currently, has several important results when contrasted with the system previously in effect in Texas. The "dollars and cents" effects of the new policy, in contrast to the prior system, when applied to hypothetical families of varying sizes are set out in table form as Exhibit E. A summary of those tables shows the following:

Mother (Caretal	ker) & 3 Childs	ren		
1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
\$164.00	\$114.00	\$102.00	\$197.00	\$98.00
Mother (Caretal	ker) & 5 Childs	ren		
1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
\$212.00	\$135.00	\$123.00	\$253.00	\$126.50
Mother (Careta)	ker), Disabled	Father & 8 Chi	ildren	
1968 Budget	8-1-68 Pmt.	9-1-68 Pmt.	5-1-69 Budget	5-1-69 Pmt.
\$320 00	\$135.00	\$123.00	\$393.00	\$196.50

As reflected in Texas' action, the implementation of section 402(a)(23) of the Social Security Act had significant effects. Budgets for families of all sizes were increased. reflecting rises in living costs. The new budget levels give better recognition to what a family needs for subsistence. Maximums on payments were abolished, thus removing entirely this arbitrary feature of the AFDC program, which particularly oppressed large families. The funds available for the program were then divided among all eligible individuals, to meet the same proportion of the needs of all. Some families received larger payments than before, some received smaller payments. Texas' failure to pay full need is unfortunate, but it does not violate section 402(a)(23) of the Social Security Act, which deals only with standards of assistance and maximums on payment, and does not purport to deal with the much broader problem of adequate funding of the AFDC program by a State.

Respectfully submitted,

ELDON B. MAHON
United States Attorney
Northern District of Texas

By:

MARTHA JOE STROUD
Assistant United States Attorney
Northern District of Texas
P. O. Box 153
Dallas, Texas 75221

Of Counsel:

ROBERT C. MARDIAN, General Counsel
HABOLD J. STAFFORD, Regional Attorney
JAMES A. MARTIN, Assistant Regional Attorney
Department of Health, Education, and Welfare

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IN THE

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Supreme Court of the United States, DAVIS, DE

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MARJORIE MILEY, SOPHIA ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAE KING, CATHRYN FOLK, ANNIE LOU PHIL-IPS, and MARJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated.

against

Petitioners.

GEORGE K. WYMAN, individually and in his capacity as Commissioner of Social Services for the State of New York, and the DEPARTMENT OF SOCIAL SERVICES FOR THE STATE OF NEW YORK.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Louis J. Lefkowitz Attorney General of the State of New York Attorney for Respondents Office & P. O. Address 80 Centre Street New York, New York 10013

(212) 488-3442

SAMUEL A. HIRSHOWITZ First Assistant Attorney General

PHILIP WEINBERG Principal Attorney

AMY JUVILER Assistant Attorney General of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, LYDIA HERNANDEZ, MARJORIE MILEY A ABROM, RUBY GATHERS, LOUISE LOWMAN, EULA MAR CATHRYN FOLK, ANNIE LOU PHILIPS, and MARJORIE DUFFY, individually, on behalf of their minor children, and on behalf of all other persons similarly situated,*

Petitioners,

against

George K. Wyman, individually and in his capacity as Commissioner of Social Services for the State of New York, and the Department of Social Services for the State of New York,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

^{*}This suit was originally entitled National Welfare Rights Organization, et al. v. Wyman, et al. That organization, lacking standing to sue, was stricken as a party plaintiff by order of the District Court dated April 23, 1969.

Opinions Below

- 1. Memorandum of U. S. District Court, E.D.N.Y. (Weinstein, J.), April 23, 1969, denying respondents' motion to join the U. S. Department of Health, Education and Welfare as a necessary party defendant (34).
- 2. Memorandum of said District Court, April 23, 1969, striking National Welfare Rights Organization as a party plaintiff (not in issue here) (31).
- 3. Memorandum of District Court, April 24, 1969, convening a three-judge Court and issuing a temporary restraining order (72).
- 4. Memorandum of three-judge Court, May 12, 1969 (Moore, C. J., Mishler, D. J. and Weinstein, D. J.), dissolving itself (133).
- 5. Opinion of District Court in support of temporary injunction, May 15, 1969 (167).
- Opinion of District Court granting summary judgment and permanent injunction to petitioners, June 18, 1969 (208).
- 7. Order of this Court, June 24, 1969, dismissing petitioners' appeal from dissolution of the three-judge Court and denying certiorari before judgment, 395 U. S. 826.
- 8. Opinion of U. S. Court of Appeals, Second Circuit, July 16, 1969, reversing the judgment of District Court and vacating preliminary and permanent injunctions and affirming the order dissolving the three-judge Court (215).

^{*} Unless otherwise indicated, numbers in parentheses refer to pages of the appendix in this Court.

9. Opinion of Mr. Justice Harlan, August 20, 1969, referring petitioners' application for stay to the full Court, not yet reported.

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1), 2101(c) and (f).

Questions Presented

- 1. Did the District Court have jurisdiction over the validity of the New York statute establishing levels of monthly allowances to welfare recipients, based on its asserted non-conformity with 42 U.S.C. § 602(a)(23)?
- a. Would alleged non-compliance with the Social Security Act, governing federal grants in aid to the states, warrant a declaration of invalidity of a state statute which establishes levels of welfare payments?
- b. Where no plaintiff's anticipated reduction in welfare payments approached \$10,000, does 28 U.S.C. § 1331 confer jurisdiction?
- c. Where there is no claim of impairment of any constitutional or federal right, does 28 U.S.C. § 1343 confer jurisdiction?
- d. If the complaint attacks a legislative act, not an individual action, does 42 U.S.C. § 1983 confer jurisdiction?
- e. Where the constitutional claim has been mooted and the three-judge court which had jurisdiction over it dissolved, may a single District Judge employ the pendent jurisdiction doctrine to retain jurisdiction over the statutory claim?
- f. Is a complaint that a State legislature has not appropriated a higher level of assistance barred by the State's sovereign immunity under the Eleventh Amendment?

- g. Where Congress explicitly confers the responsibility for supervision of state programs on the Department of Health, Education and Welfare, which has not had an opportunity to complete its presently pending administrative review, is a cause of action based on the alleged non-conformity of the State statute to the Social Security Act ripe for judicial review?
- 2. Did New York's 1968 increase in its standard of need for welfare recipients so as to fully reflect increases in the cost of living constitute compliance with 42 U.S.C. § 602(a). (23)?

Statutes Involved

42 U.S.C. § 602(a)(23) in its entirety provides:

"[The States shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

New York Social Services Law § 131-a in pertinent part provides:

"1. Any inconsistent provision of this chapter or other law notwithstanding, social services officials shall provide home relief, veteran assistance, old age assistance, assistance to the blind, aid to the disabled and aid to dependent children, to eligible needy persons who constitute or are members of a family household, in monthly or semi-monthly allowances or grants in accordance with standards established by the regulations of the department, but not in excess of the schedules included in this section, less any available income or resources which are not required to be disregarded

by other provisions of this chapter. Such schedules shall be deemed to make adequate provision for all items of need in accordance with the provisions of section one hundred thirty-one, exclusive of shelter and fuel for heating, for which two items additional provision shall be made by the social services districts in accordance with the regulations of the department.

2. The following schedule of maximum monthly grants and allowances shall be applicable to the social services district of the city of New York:

Number of Persons in Household

One Two Three Four Five Six Seven \$70 \$116 \$162 \$208 \$254 \$297 \$340

For each additional eligible needy person in the household there shall be an additional allowance of fortythree dollars monthly.

3. The following schedule of maximum monthly grants and allowances shall be applicable to all other social services districts:

Number of Persons in Household

One Two Three Four Five Six Seven \$60 \$101 \$142 \$183 \$224 \$257 \$290

For each additional eligible needy person in the household there shall be an additional allowance of thirtythree dollars monthly."

Statement of the Case

This action was instituted as a challenge to the validity of New York's legislative enactment establishing a schedule of monthly grants to AFDC recipients, enacted by the New York State Legislature on March 31, 1969 to take effect on July 1, 1969 (Social Services Law § 131-a). The

purpose of the suit and effect of the preliminary and permanent injunctions issued by Judge Weinstein was to force the State to revert to its earlier administratively set levels and methods of payment which had been established pursuant to Social Services Law § 131. Two challenges to the statute were made—first, that the new statute allegedly did not comply with 42 U.S.C. § 602(a) (23), a section of the Social Security Act governing the eligibility of states for grants in aid under the AFDC program, and secondly, that the new statute in establishing higher levels of payments to recipients within New York City than those outside the city constituted a denial of equal protection.

For decades New York has mandated public welfare officials, "insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves" and to determine the adequacy of assistance provided "in accordance with standards of public health in the community with due regard for variations in cost from time to time and between localities" (Social Services Law § 131[1, 3]). Pursuant to this statutory standard, the New York State Department of Social Services has established items of basic need and levels of payment administratively and, from year to year, conducted cost-of-living surveys and adjusted such standards and levels in accordance therewith. See former 18 N. Y. Code of Rules & Regs. [NYCRR] § 352.4 (repealed eff. July 1, 1969). Thus in August, 1968, the Department, employing United States Bureau of Labor Statistics cost-of-living figures, as well as its own statistical material based on its actual pricing of items throughout the State, readjusted the schedule of grants (88-89, 102-105).

The resultant standard of need was calculated and the State divided into three areas, with standards varying by a few dollars per month on the basis of cost of utilities. Monthly cash allowances, exclusive of rent and fuel for heating (which are added separately to each recipient's payment), were calculated based on the number of per-

sons in the family and the age of the oldest child, comunted in two-year intervals (89, 92; Document No. 26, Exhs. "B". "E"). Thus, in the area denominated "SA-1" (New York City, Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester Counties), a family of four received an allowance ranging from \$152.00 where the oldest child was five or under to \$221.00 where the oldest child was sixteen or over (102). The mean age of children in families participating in the Aid to Families With Dependent Children program (herein "AFDC"), by far the major component of all welfare recipients in this State, ** was calculated in a chart (92-95, 107; Doc. No. 26, Exh. "E") which indicated that, for example, in a family of four the mean age of oldest child was 10.09 years, so that the average monthly allowance (again exclusive of rent and fuel) received by a family of four receiving AFDC after the adoption of the August. 1968 cost of living adjustment was \$191.00. Prior to this adjustment the figure was \$173.00.

The 1969 Legislature in enacting § 131-a made three substantial changes in New York's public assistance program. It set levels of payment legislatively, rather than administratively; it averaged the age of the oldest child, thus eliminating age differentials in determining the level of aid to each size family, and it eliminated the special grant procedure. However, all of these important changes are based on the 1968 revised standard of need.

The elimination of age differentials and special grants greatly simplified New York's program of assistance. These

^{*}Document numbers refer to items in the original record before the Court of Appeals which have not been reproduced in the appendix, although the record has been transmitted to this Court.

^{**} In New York State the AFDC program encompasses 886,860 of 1,210,601 welfare recipients [1968 figures].

In New York City 657,089 received AFDC allowances out of 889,262 total welfare recipients [1968 figures].

simplifications had been suggested by the Department of Health, Education and Welfare (herein "HEW") to all the states as early as February 5, 1964 (HEW State Letter No. 712, Document No. 49). It was also proposed by the State Department of Social Services in its 1968 report to the Governor concerning the revamping of the Welfare Law in order to stop the vicious cycle of poverty that has seemed to envelop its recipients ("Challenge and Response," Report by New York State Board of Social Welfare, pp. 2-5, Respondents' Exhibit below).

Special grants were payments for non-recurring expenditures over and above the general standard of assistance and only dispensed to a recipient who demonstrated a special need. The new law incorporates in statute for the first time in New York the flat grant concept, regarded as the most enlightened and progressive method of public assistance payment, eliminating the necessity of the welfare recipient applying for individual items—often a degrading and time-consuming process—and thereby enhancing his dignity, increasing his ability to budget and his self-respect, and freeing case workers from bookkeeping and petty decisions in order to allow them to devote their time to counseling of recipients.

The legislative history of the statute here under attack demonstrates the thorough, comprehensive study given the flat-grant concept by the Legislature. Extensive hearings were held and documentary evidence and testimony adduced by Social Services administrative officials, caseworkers, and other experts (Documents 49, 50). The flat-grant approach was approved by virtually all as "uniformly consistent" and "more realistic" (Document 60). The witness of the N. Y. State Communities Aid Association strongly advocated flat grants as an approach which "[a]t one stroke * * * would simplify and speed up the administrative process, and would let the social worker devote attention to counseling and other remedial services.

From the welfare families' point of view, flat grants would expedite assistance, and would give the recipient control of the full amount of cash to which he is entitled—rather than have the caseworker dole out a dime here for bobbie pins, or a dollar there for a floor mop." In addition, flat grants would, it was felt, "help strengthen a sense of personal responsibility".

The Nassau County Social Services Commissioner summarized the advantages of flat grants as fostering "equality and the avoidance of preferential treatment" (Document No. 50, p. 6). New York City's Department expressed an even stronger judgment as to the superiority of the flat-grant approach (Document No. 26, Exh. D).

The Joint Legislative Committee dealing with revision of the Social Services Law, after digesting this plethora of testimony and documentary material, conferred with the Department of Social Services and the levels set forth in the schedules contained in § 131-a were established. The mean age of the oldest child in each size family was computed. The amount provided in 1968 for a family of each size in cases where its oldest child was of that mean age was then adopted as the standard allowance for that size family. Where the mean age contained a fraction, the older age was used. Thus, for a family of four, which received amounts ranging from \$152.00 to \$221.00 (depending upon the age of its oldest child), the mean age of such oldest child was found to be 10.09 and, therefore, \$191.00, the figure where the oldest child was ten or eleven, was used as a base amount. To this was added \$17.00—the amount necessary to bring the allowance up to \$3,535.00, the annual subsistence level determined by the United States Government for New York City for a family of four (92-93, 107), or a monthly allowance of \$208.00. The allowance for the remainder of the state was determined at a differential of \$25.00 for a family of four (93). An amendment to § 131-a permits the other welfare districts

to be increased to the New York City level if the cost-ofliving figures so dictate. As the computations of the Department show, these levels, based on the previous allowance including the cost-of-living increases of 1968, result in slightly increased benefits to families with younger children and slightly decreased benefits to those with older children (94-95). These adjustments exclude rent and fuel, which are paid separately, as well as the additional items now paid on a purchase-of-services basis by the Department (95-96).

The New York standard of need includes, as we have shown, rent, which is a major component although not encompassed in the § 131-a schedule, since it varies with the amounts actually paid by each family. Average monthly rent for an AFDC family of four in New York is \$83.90 (95). It is undisputed that rents have increased during the period 1968-1969 (95). These substantial increases in rent—13% in New York City in the past three years—represent a substantial increase in the standard of need and in the actual level of payment to welfare recipients in New York over and above the levels set in § 131-a.

Finally, the Legislature was well within the broad ambit of its discretion in establishing welfare payments pursuant to a flat-grant system when it recognized the wide

^{* &}quot;4. Provided it accords with federal requirements, the regulations of the department shall provide that the commissioner, with respect to any social services district to which subdivision three applies, may promulgate a schedule of monthly grants and allowances for greater or lesser amounts than established by the regulations of the department applicable to such district, but not to exceed the maximums prescribed by subdivision two, for all items of need exclusive of shelter and fuel for heating, if it is established that in such district the total cost of the items included in the schedule applicable to such district actually is more or less, as the case may be, than the cost thereof reflected in such schedule. A social services official may, with the approval of the appropriate local legislative body, make application to the department for the promulgation of a schedule pursuant to this subdivision." (Added to § 131-a by L. 1969, ch. 411, enacted May 2, 1969.)

disparity in the real levels of welfare payments throughant the state (94). The special grant system militated heavily in favor of the more aggressive or sophisticated welfare recipient. The size and frequency of special grants varied enormously according to locality and according to the vagaries of individual caseworkers and welfare administrators as well as the assiduousness with which such special grants were requested by recipients. This approach was, as we have shown, universally rejected as outmoded and unfair by every serious commentator in the field, and specifically condemned by the Department of HEW (Document 49). The Legislature had a right to consider these criticisms of the existing system of administratively established levels of special grants and to substitute therefor a flat-grant approach which would eliminate disparities in actual benefits received due to factors unrelated to need.

New York, like every state, receives federal funds through the AFDC and other programs administered by HEW under the Social Security Act (42 U.S.C. §§601, et seq.).* This program, established in 1935, provides certain minimal requirements which the States must meet in order to be eligible for participation therein. Although § 601 requires the Secretary of HEW to approve state plans, including the standard of need (the components of a subsistence budget designated by each State), there is no federal regulation which governs the amount a State actually pays to its recipients. This is dramatically demonstrated by the chart showing the enormous disparity in sums actually paid by the various states under their AFDC programs—ranging from \$71.75 per average recipient in New York, through \$58.25 in New Jersey (the next highest State) to \$8.50 in

^{*} Social Security Act sections will be referred to herein as § 601, § 602, etc., their numbers in 42 U.S.C. Section 601 is also known as § 401 of the Social Security Act of 1935; § 602 is § 402, etc.

Mississippi (117). The legislative history of the Social Security Act (S. Rep. 628, 74th Cong., 1st Sess. 4 [1935]) candidly notes that "[1]ess Federal control is provided than in any recent Federal aid law." As this Court noted in King v. Smith, 392 U. S. 309, 318-319 (1968), "each State is free to set its own standard of need and to determine the levels of benefits by the amount of funds it devotes to the program."

In 1968 Congress added to \$602(a) the provision on which this suit was based. That sub-section, set forth at p. 10, supra, embodied in federal law the cost-of-living adjustment to its standard of need which New York has made periodically through the years by conducting re-pricing surveys annually, employing Bureau of Labor Statistics material, and re-adjusting its allowance schedules whenever prices have increased 2% or more (88-89). Indeed, \$602(a) (23) was severely limited in scope from the bill originally introduced by HEW in Congress and, as enacted, only requires the states to readjust their standards of need and maximums paid once during the period ending July 1, 1969.

The bill originally introduced by HEW (H.R. 5710, § 202, 90th Cong., 1st Sess.) which emerged as § 602(a)(23) contained requirements that all states, by July 1, 1969, pay a benefit equivalent to their full standard of need, which many states now fall short of doing. In fact 28 states pay less than their own professed standard of need (106).* See table appended to this brief. The bill also required each state to review its standards annually.

^{*}In Alabama the standard of need for an AFDC family of four, including rent, is \$177.00 but the actual amount paid is only \$89.00. And in Missouri, the standard of need of \$305.00 exceeds New York's, but the actual amount paid is only \$124.00, while New York pays its full standard of need—\$278.00. Mississippi pays \$55.00 (106).

As enacted, however, the statute (H.R. 12080, § 213, 90th Cong., 1st Sess.) excluded these provisions, which would have fundamentally altered the structure of public assistance in this country and done much to reduce the vast gap in payments from state to state. It did no more than require that states adjust their standard of need, as well as any dollar maximum imposed on the amount paid to families (New York had no such maximum), by July 1, 1969. This New York plainly did in its 1968 cost of living adjustment.

The 1969 New York Legislature, in adopting the section here challenged, for the first time embodied the monthly allowance schedule in the statute. It employed, however, the 1968 computation of allowance based on the cost of living adjustment which fulfilled the requirements of § 602(a)(23). For the first time it enacted for the State as a whole the fat grant approach to public assistance payments, under which a monthly sum is computed and used as a base allowance, encompassing all expenses of the welfare recipient except rent and fuel for heating, which continue to be paid separately. Special grants for expenses such as moving, special diets, etc., which were administratively authorized under the earlier law, were eliminated and the monthly allowance, increased somewhat, was deemed to include all extras. The Department of Social Services, in addition, is free to provide directly for moving expenses, apartment security deposits, etc., over and above the grants on a direct purchase of services basis (95, 285-286). See 18 NYCRR § 352.5.

^{*}The New York City Department of Social Services in 1968 established a pilot demonstration project in which it used flat grants on a cyclical basis, replacing special grants for many items of clothing and household materials. In requesting approval of this project from the Department of Social Services, the City Department specifically sought permission to "[r]elieve front-line agency personnel from the cumbersome, demeaning, conflict-ridden, idiosyncratic, and administratively costly process of client-by-client and item-by-item decision making" (Document No. 26, Exh. D).

Proceedings Below

This action sought judgment declaring § 131-a invalid and enjoining its enforcement, thus forcing the State to revert to the earlier administratively set levels of payment established pursuant to § 131. Originally two challenges to the statute were raised—the State's alleged non-compliance with § 602(a)(23) and, in addition, a claimed denial of equal protection of the laws to those plaintiffs who resided in Nassau County on the ground that the statute established higher levels of payments to recipients within New York City. The equal protection claim was mooted by an amendment to § 131-a(4) permitting the Commissioner of Social Services to raise the level of payments in any county to that paid to New York City recipients, and authorizing the Board of Supervisors of any county to request such an increase (fn. p. 10, supra).*

The District Court issued a temporary restraining order on April 24, 1969 and, granted the motion of respondents (over petitioners' opposition [260-265]) that a three-judge Court be convened pursuant to 28 U.S.C. § 2281 since the latter of petitioners' attacks on § 131-a invoked the equal protection clause (72-77). The District Judge denied respondents' motion to join the Secretary of HEW as a party defendant pursuant to Federal Rules of Civil Procedure 19(a).

Both sides moved for summary judgment before the three-judge Court (Moore, C.J., Mishler, D.J. and Weinstein, D.J.).

^{*} The alleged denial of equal protection stemming from the disparity in payment levels as between New York City and the remainder of the state is the subject of a subsequent action, Rothstein v. Wyman (S.D.N.Y., 69 Civ. 2763), in which a preliminary injunction was issued by a three-judge Court on September 12, 1969 enjoining the State from maintaining different payment levels. That injunction has been appealed to this Court. See amplification of Rothstein's effect at pp. 33-34, infra.

By order dated May 12, 1969 that Court dissolved itself on the ground that the constitutional issue had become mooted by the amendment to § 131-a (133-136). Judge Weinstein thereafter issued his preliminary injunction against enforcement of the statute (137-139), despite the fact that it was not to take effect until July 1, 1969 and despite the uncontroverted estimate that suspension of § 131-a would require the State to pay out \$10,000,000 each month more than the amount payable pursuant to § 131-a—an amount completely irretrievable once disbursed (65-66).

That decision, although ostensibly granting a preliminary injunction, in fact ruled against the validity of the state statute in every important respect and effectively ruled it to be invalid, stopping just short of an express order to that effect. It held that the federal cost-of-living amendment "precludes" New York from enacting the statute its Legislature determined to constitute an enlightened, comprehensive approach to the complex problems involved in setting adequate levels of welfare grants in a period of rapidly increasing numbers of recipients—especially in the AFDC program here at issue. As we shall show, the narrow, technical provision cited by the District Judge utterly fails to support the unprecedented use to which it was put as a lever to invalidate the New York statute.

The District Judge found "a number of independent bases for concluding that jurisdiction exists" (168) and held it "clear that at the time the three-judge court was convened jurisdiction existed pursuant to [28 U.S.C. § 1343(3) and 42 U.S.C. §§ 1983, 1988]" (169). But those statutes do not support that conclusion. See Point I, infra. Even when the constitutional issue was mooted and the three-judge court which had jurisdiction over it was dissolved, the District Judge nonetheless claimed pendent jurisdiction over the statutory claim (169-172).

Judge Weinstein recognized the possibility of a conflict with this Court's rule in *United Mine Workers* v. Gibbs,

383 U.S. 715, 726 (1966):

"Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."

See also, Wham-O Mfg. Co. v. Paradise Mfg. Co., 327 F. 2d 748, 753 (9th Cir. 1964). The District Judge conceded this rule but decided it was no more than a voluntary abstention which would be "wasteful of judicial energy and dangerous to the litigants" if practiced here (171).

The District Judge also concluded that he had jurisdiction under 28 U.S.C. § 1331, even though that section requires that "the matter in controversy exceeds the sum or value of \$10,000." He acknowledged that the claims of individual plaintiffs may not be aggregated to satisfy that statute, Snyder v. Harris, 394 U. S. 332 (1969), reh. den. id. 1025, and that none of the anticipated reductions of any of the plaintiffs approached \$10,000 (173). But he used § 1331 as a basis for jurisdiction through the novel suggestion that "indirect damage" to them could occur if reductions in their welfare grants caused malnutrition so severe as to retard "their children's physical and mental development" (174-176). This theory, conveniently created for this occasion, is utterly speculative and rests on a pillar of inferences far too shaky to provide a solid jurisdictional base. It is particularly ironic when one considers that the level of AFDC payments in New York is the highest in the entire nation.

The District Judge misread § 602(a) (23) and totally disregarded its legislative history and its administrative construction by HEW (see HEW's brief submitted in Lampton v. Bonin, appended to petitioners' brief [A-14-A-31]), concluding it deserved a "broader construction" and that it required every state to increase its level of welfare payments (194-199). In fact that section, as it emerged from Congress, requires only that the standard of need of each state, and "any maximums that the State imposes on the

amount of aid paid to families," be increased. See Point II, infra. The legislative history cited by the District Court (195-199) dealt with the bill as introduced by HEW, which would have mandated annual increases in line with cost-of-living increases, and would have required each state to pay its full standard of need. But the amendment which actually passed was emasculated and contained no such broad changes. Moreover, as we shall show, the District Judge's insistence that § 602(a)(23) wrought far-reaching reforms (despite its debilitation by Congress) runs counter to HEW's own interpretation of the very statute.

The Court of Appeals stayed the preliminary injunction on June 11, 1969. In the meantime the District Judge granted summary judgment and a permanent injunction to petitioners on June 18, 1969 (208). The Court of Appeals likewise stayed that injunction on the following day. At this juncture petitioners sought immediate review in this Court and vacatur of the Court of Appeals' stays, both of which were denied by this Court on June 24, 1969 (395 U. S. 826).

On July 16, 1969 the Court of Appeals reversed Judge Weinstein's injunctions and dismissed the complaint (215). The opinion by Hays, J. upheld the dissolution of the three-judge Court since any determination by it "would have been premature and its decision would have been rendered moot by the provision of the new schedules for Nassau County" (220), adding "[t]he court was right in refusing to act on facts that were fluid and subject to early change" (220-221). It went on to hold that the District Judge lacked jurisdiction either under the pendent jurisdiction doctrine invoked by him or under any other theory. Pendent jurisdiction was unavailable, as the Court of Appeals held (221-222):

"The assertion of a constitutional claim required the convening of a three-judge district court. 28 U.S.C. § 2281 (1964). That court is the only court which ever had jurisdiction over the constitutional claim. Since

the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power."

Aptly describing petitioners' construction of the pendent jurisdiction doctrine as "overbroad," the Court held that even if it were accepted, "we would hold in the present case that the district judge's exercise of such jurisdiction was an abuse of discretion" (222):

"We believe that it is inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.

A federal court should not assert such power over a state legislature unless there is no possible alternative. Even if the district judge had had discretion, he should have refused to rule on the statutory claim."

The Court went on to hold that HEW "is now engaged in a study of the relationship between Section 602(a)(23) and Section 131-a. HEW, with its acknowledged expertise in the field of social security, is far better equipped than the Federal Courts to receive an alleged inconsistency between a complex state statutory scheme for payments in behalf of dependent children and an ambiguous amendment to the Social Security Act." It concluded that "[t]he District Court, even if it had power to act on the pendent claim, should have declined to do so, at least until HEW had completed its consideration of the matter" (223).

The Court rejected the District Court's invocation of 28 U.S.C. § 1331 as a basis for jurisdiction since the "indirect damage" alleged by petitioners was "too speculative to create jurisdiction" under that section (224-225), citing Boyd v. Clark, 287 F. Supp. 561, 564 (S.D.N.Y. 1968), aff'd on another issue 393 U. S. 316. And it likewise held that neither 28 U.S.C. § 1343 nor 42 U.S.C. § 1983 provide any footing to petitioners since the requisite assertion of deprivation of a federally-protected right was lacking (226):

"The burden of the complaint is that New York's statute, Section 131-a, is not in conformity with the requirements of Section 602(a)(23) of the federal statutes and that therefore New York is not entitled to receive federal grants under the AFDC program. Plaintiffs have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See New York v. Galamison, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U. S. 977 (1965); Bradford Audio Corp. v. Pious, 392 F. 2d 67 (2d Cir. 1968).

Moreover, it is clear that the defendant Department of Social Services for the State of New York is not a 'person' within the meaning of Section 1983. [Citing cases]."

Addressing the merits, the Court noted that "our decision does not rest solely on jurisdictional grounds" (227), and observed that § 602(a)(23), as introduced, "would have required each state to pay its full standard of need and to adjust that standard annually in accordance with changes in the cost of living," but that in the statute as finally adopted, both these provisions were eliminated (227). It rejected the view advanced by petitioners "that § 602(a)(23) sets a floor under state AFDC benefits, freeing them at their previous level plus the cost of living adjustment," and held it made "two far less dramatic

changes"—(1) requiring each state to adjust its standard of need by July 1, 1969 to reflect changes in the cost of living, "but not [to] require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them," and (2) adjusting family maximums to reflect cost-of-living increases (New York has no such maximum) (228-229). The Court of Appeals noted that "[t]he Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the levels of benefits" (229), and added (230):

"It is inconceivable that if this were the far reaching measure serving to reverse a basic national policy which plaintiffs claim it was, it should be adopted without comment from committees and individual members of Congress."

In this connection the Court found it noteworthy (230) that neither the summary of social security amendments for 1967 prepared by the Senate Committee on Finance and House Committee on Ways and Means, nor the report for that year of the Senate Finance Committee, even mentioned the provisions of § 602(a) (23).

Chief Judge Lumbard concurred with Judge Hays' opinion, noting that he "agree[d] with much of" it, but suggesting that although the District Judge had pendent jurisdiction, he abused his discretion in rendering judgment on the § 602(a) (23) claim after the constitutional issue had become moot (231-232). In this regard, Judge Lumbard stated that "the extreme nature of the injunctive remedy against the State weighs heavily against the adjudication of a pendent claim by a single District Judge" (233)—particularly where, as here, "the constitutional claim had been dismissed well before a substantial investment of federal judicial resources in the case as a whole at the time of the reference of the pendent claim to the single judge" (233).

Moreover, Chief Judge Lumbard agreed with the majority that "the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the Courts" (233). He went on to substantially agree with the holding that, aside from the remedy before HEW, the federal courts lacked jurisdiction over the claim under § 602(a)(23) (234), concluding (235):

"Since I do not feel that the federal courts are the appropriate forum for the initial resolution of plaintiff's statutory claim, I do not reach the merits of that claim. At the same time, I should add that Judge Feinberg's view of the merits does not persuade me."

Dissenting, Judge Feinberg followed the views espoused by the District Judge, but contended that the 3-judge Court should not have been dissolved (257-258).

Summary of Argument

The federal courts lack jurisdiction over a claim that a state's asserted non-compliance with the Social Security Act renders void that state's statute establishing monthly welfare allowances. None of the purported bases for federal jurisdiction urged by petitioners are tenable. In the absence of any constitutional issue (the equal protection claim having been properly found moot and the 3-judge court having properly dissolved itself), it is beyond the reasonable scope of the judiciary to declare void a state statute providing levels of welfare payment on the ground of its failure to comply with what are at most conditions of eligibility to receive federal grants.

^{*}The dissent concluded (258): "If I thought that the dissolution of the three-judge court completely divested Judge Weinstein of all jurisdiction then I would regard the decision to dissolve as an abuse of discretion and would dissent on that ground too. However, * * * I do not attach that consequence to dissolution and, accordingly, need not go that far."

Moreover, such a claim amounts to a suit against the state, barred by separation of powers in that it seeks to compel the legislative appropriation of state monies—relief far in excess of that involved in King v. Smith.

In addition, the pendency of an administrative proceeding before HEW to determine the precise issue sought to be litigated here—the conformity of the New York Statute to § 602(a)(23)—renders this action unripe for judicial determination. This is no technical objection but goes to the core of petitioners' attempt to short-circuit HEW and embroil the judiciary in the minutiae of conformity of state plans to the Social Security Act provisions before the Department has had an opportunity to initially pass on these very issues, which it must do in any event.

If, the federal judiciary had jurisdiction here, the complaint was in any event correctly dismissed since New York fully complied with § 602(a)(23). That amendment required each state to adjust its standard of need, and family maximum if any, during the period January 2, 1968-July 1, 1969 to reflect cost-of-living increases. This New York did by its 1968 adjustment of allowance levels. The adoption of § 131-a in 1969 represented an averaging of the levels, as increased by the 1968 adjustments, so as to pay flat grants to all families of given size. These changes ended earlier distinctions based on the age of the oldest child and also, in keeping with the overwhelming preponderance of enlightened opinion in the field, abolished special grants to welfare recipients, substituting a flat grant. No violation of \$602(a)(23) can be culled from the decision of New York to change from an obsolete, cumbersome system of special grants to a simpler flatgrant method at the same levels, eliminating bookkeeping by state and local personnel and determinations of eligibility for special grants, and freeing caseworkers for counseling services. Neither the wording of § 602(a)(23) nor its legislative history support its use, attempted by

petitioners, as a lever to invalidate New York's statute establishing welfare payment allowances—already the highest in the nation.

POINT I

The District Court lacked jurisdiction over the claim asserted by petitioners. None of the jurisdictional bases asserted by them provides any warrant for disposition of their claim in the federal courts.

The Court of Appeals correctly found that no jurisdiction existed in the federal courts over the claim asserted by petitioners. The jurisdictional defects transcend the utter failure by petitioners to satisfy any of the statutes invoked by them, and highlight the extraordinary nature of the claim—one which lies beyond the powers of the judiciary, however broadly described.

A. Assertions of non-conformity with § 602(a)(23) do not confer jurisdiction to invalidate a State statute.

In essence this is an action, in the guise of a suit against the named defendants Commissioner and Department of Social Services, to compel the New York Legislature (not named as a party defendant) to appropriate more money for welfare. The deprivation of no constitutionally-protected right was alleged, except the peripheral equal protection claim, properly ruled moot by the 3-judge Court. See pp. 33-34, infra. (That claim is now being litigated in Rothstein v. Wyman, following subsequent administrative action by respondents which, in the opinion of the 3-judge Court in that case, ended the unripeness found by the 3-judge Court here to be a bar to determination of that claim. The merits of the equal protection contention are not involved here.)

Petitioners' remaining assertion, and the only one ever seriously pressed in this case, is the claimed non-conformity of the State statute with § 602(a)(23), a narrow techni-

cal amendment to the Social Security Act provisions establishing criteria for federal participation in state AFDC programs. Nothing in the Act contemplates employment of its provisions as a vehicle for invalidating a state statute on the ground of its non-conformity. See Norton v. Blay. lock, 285 F. Supp. 659 (W. D. Ark. 1968), where a discharged State welfare department employee asserted that her dismissal without cause was in violation of 42 U.S.C. §§ 304, 605, 715, 1204 and 1384, each of which provides, in the case of each federal grant program (AFDC, aid to the blind, old-age assistance, etc.), "that if a participating State does not set up and abide by a suitable employee merit system, federal funds may be withheld." The Court held that despite this "strongly [expressed] congressional policy in favor of job security for State welfare employees," relief was limited to a withholding of federal funds, and that an order overturning the plaintiff's discharge was beyond the scope of its authority. 285 F. Supp. at 663.

Petitioners rely heavily on King v. Smith as precedent for their attempt to overturn § 131-a for non-conformity. But, as the Court of Appeals held, that case involved totally different considerations. There the main thrust of the challenge to the Alabama regulation was its denial of equal protection, and the 3-judge Court's decision invalidated the regulation primarily on that ground, as well as on its inconsistency with the Social Security Act. 277 F. Supp. 31. Jurisdiction plainly existed because the statutory claim rested on the same facts as this substantial constitutional claim. This Court's affirmance was based on the statutory argument alone, but the Court's opinion explicitly stated (392 U. S. 309, 312, n. 3):

"We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." Although the District Court's judgment invalidating the Alabama regulation was affirmed on the basis of its inconsistency with the Act, the Constitutional issue remained in the case and was argued at length in this Court. Indeed, the question of jurisdiction over the statutory issue does not appear to have been argued by the State. This Court's decision was that (392 U. S. at 333) Alabama had a choice of invalidating its regulation or of losing federal funds:

"The regulation is therefore invalid because it defines 'parent' in a manner that is inconsistent with § 406 (a) of the Social Security Act. 42 U.S.C. § 606(a).34 [n. 34: There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 295 (1958); Oklahoma v. Civil Service Comm'n., 330 U. S. 127, 143 (1947). It is equally clear that to the extent HEW has approved and so-called 'man-in-the house' provision which conflicts with § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such approval is inconsistent with the controlling federal statute.]"

That disposition is inapplicable to the present case. No one pretends that jurisdiction here is appropriate to protect federal funds from unfair disbursement. On the contrary, petitioners seek to obligate the federal treasury at a rate of approximately \$5,000,000 per month.

Further, involved here is not a regulation containing a definition limiting a group of persons eligible for welfare, but the State's basic statute establishing actual levels of welfare allowances—and King v. Smith is itself authority for the undeniable fact that the states are free to establish standards of need and levels of payment. See 392 U.S. at

318-319 ("each State is free to set its own standards of need and to determine the level of benefits by the amount of funds it devotes to the program"); id. n. 15 ("[t]he level of benefits is within the State's discretion"). It is significant that this Court wrote this language some months after the enactment of \$602(a)(23). Moreover, the continued HEW acquiescence in Alabama's regulation has no analogy here, where the State statute was not yet even in effect when this suit was brought, and where proceedings to determine conformity were pending before HEW. See Point I, infra, as to the prematurity of this case and the pendency of jurisdiction in HEW.

That King v Smith does not provide a basis for jurisdiction here is highlighted by Justice Douglas' concurrence, which demonstrated that the holding that the regulation was inconsistent with the federal statute "does not completely resolve the question presented" since "Alabama is free to revive enforcement of its substitute parent regulations at any time it chooses to reject federal funds made available under the Social Security Act." 392 U. S. at 335, n. 3.

The fact is that any inconsistency between a State statute establishing levels of welfare payment and a Social Security Act provision can do no more than render that state ineligible to receive federal grants pro tanto. The federal government has not preempted the field of welfare. It has, on the contrary, left that responsibility almost entirely to the states. So long as the states transgress no constitutional mandate, inconsistency between the state law and the Social Security Act may result only in a forfeiture by the state of federal grants, and create no independent cause of action to invalidate the state statute. This is borne out by Oklahoma v. Civil Service Commission, 330 U.S. 127, 143 (1947), itself cited in King v. Smith (392 U. S. at 333, n. 34). The State there challenged the withdrawal of federal highway construction funds following determination by the United States Civil Service Commission that a State highway official had engaged in political activity in vioation of the Hatch Act. This Court held the withdrawal of federal money was an appropriate use of the federal government's "power to fix the terms upon which its money allotments to states shall be disbursed." Id. at 143. Oklahoma could refuse to dismiss the official and forfeit federal grants. But the courts lacked jurisdiction to compel the State to discharge the official. This Court aptly described the scheme as "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans." Id. at 144. No more is involved here.

An action to void a state statute on the ground of its asserted inconsistency with the prerequisites for federal grants is a contradiction in terms. Examination of the applicable provisions of the Act underscores this fact, 42 U.S.C. § 601 authorizes Congress to appropriate "for each fiscal year a sum sufficient to carry out the purposes" of "encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in each State, (Emphasis supplied.) These sums "shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children." The following section (§ 602) enumerates the provisions which State plans must contain in order to be eligible for federal funding. Section 604 permits the Secretary of HEW, after notice and hearing, to find that a State has failed "to comply substantially with any provision required by section 602(a) . . to be included in the plan," and to "notify such State agency that further payments will not be made to the State until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply." This provision is presently the subject of an action (National Welfare Rights Organization v. Finch, D.C.D.C., Civ. 2954-69) to compel HEW to enforce \$602(a)(23) as against various states.

This configuration is one of federal grants-in-aid and statutory eligibility requirements which bind each State to comply on pain of termination of federal funding. But there is no authority anywhere in this scheme for judicial invalidation of a State welfare allowance statute based on its alleged non-compliance with a prerequisite to grants-in-aid. In the context of this statutory scheme, to invoke § 602(a)(23) as a weapon against a state statute is an anomaly.

That the striking down of a state statute establishing levels of welfare payment on the ground here asserted is beyond the judicial function, as the Court of Appeals recognized, is borne out by the absence of any statutory authority for jurisdiction in the District Court. Although petitioners invoked several statutes in their effort to find jurisdictional footing, and the District Judge amazingly accepted their view of each of these statutes (28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983), the Court of Appeals correctly separated these strands and held none sufficient to confer jurisdiction. In fact the statutes invoked by petitioners simply do not admit of the sort of stretching in which the District Court indulged.

B. Section 1331 is of no assistance to petitioners, who patently fail to allege the \$10,000 jurisdictional prerequisite.

28 U.S.C. § 1331 is a slender reed on which to support this action, and its use was properly rejected by the Court of Appeals. That section requires a controversy arising under the Constitution, laws or treaties of the United States and involving \$10,000 or more. It is beyond dispute that the monetary jurisdictional requirement is to be computed from the standpoint of the plaintiffs' injury. Teeval, Inc. v. City of New York, 92 F. Supp. 827 (S.D.N.Y. 1949). It must be computed on basis of "matter directly in dispute in any particular cause" and not on its collateral effects. Quinault Tribe v. Gallagher, 368 F. 2d 648, 654 (9th Cir. 1966), cert. den. 387 U. S. 907. None of

the plaintiffs here alleged damages even remotely approaching the \$10,000 limitation. And it is clear that the plaintiffs' claims may not be aggregated for the purpose of reaching the monetary requirement. Snyder v. Harris, 394 U. S. 332, supra. Welfare is a privilege for which am individual must apply and satisfy specific standards in order to qualify. There is plainly here no "single title or right in which [the plaintiffs] have a common and undivided interest." (Snyder, supra, at 335.) As this Court held, "to allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action * * * would seriously undercut the purpose of the jurisdictional amount requirement" (id. at 340). The class action device was rejected as a means of avoiding the jurisdictional sine qua non of 6 1331.**

The District Judge circumvented the inapplicability of § 1331, however, through the invention of a new jurisdictional theory, unsupported by any case, in which he de-

^{*}Although the plaintiffs were carefully culled out of hundreds of thousands of welfare recipients, the plaintiff alleging to lose the greatest amount (Duffy) will, at her own figures, lose \$174.40 on a monthly basis (17)—far short of the jurisdictional threshold. And even this amount represents the alleged reduction in allowance of her entire family. Even assuming all the reduction were attributable to her, it would take four years and ten months be ore this reduction amounted to \$10,000—assuming she were on welfare throughout, and that levels of payment remained unchanged. This figure also ignores the difference in the real benefits received by her resulting from food stamps, purchase of services, etc., as well as the payment of rent and fuel which are paid separately. This illustrates the speculative, conjectural nature of petitioners' attempts to satisfy the \$10,000 jurisdictional prerequisite, as even the District Court held (173).

^{**}The legitimacy of this suit as a "class action" (R. 23, Fed. R. Civ. P.) is itself open to serious question, since in contrast to Shapiro v. Thompson (394 U. S. 618 [1969]), King v. Smith, and other genuine class actions involving welfare recipients, admittedly not all AFDC recipients in New York are detrimentally affected by the statute and thus the extent of petitioners' "class" is so nebulous as to render the concept inapplicable.

duced that "indirect damage" to the plaintiffs, who receive the highest welfare benefits in the country (see table appended to this brief, B-2), would be analogous to that of a starving "Biafran child" (174), and thus in excess of the \$10,000 prerequisite. This flies in the face of this simple, quite specific statute and would confer federal jurisdiction wherever a claim of physical or mental injury could be asserted. This is simply not the law. See Boyd v. Clark, supra, 287 F. Supp. 561, 564, aff'd on another issue 393 U. S. 316:

"It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars.".

Moreover, it was petitioners and not their children who had to satisfy these jurisdictional requirements. And aside from the irony of alleging the threat of such injuries where the challenged statute increases the benefits of nearly as many recipients as it reduces, consideration of this claim of possible psychic damage was improper under every relevant decision. See, in addition to Boyd v. Clark, Dermody v. Smith, 88 F. Supp. 620 (N. D. Ind. 1949); Reese v. Holm, 31 F. Supp. 435, 441 (D. Minn. 1940) ("Sheer conclusions and assertions of collateral damage are not pertinent or competent in determining the amount in controversy"). See also Quinault Tribe v. Gallagher, supra, 368 F. 2d at 655; Vicksburg, S. & P. R. Co. v. Nattin, 58 F. 2d 979, 980 (5th Cir. 1932):

"Jurisdiction is based on actuality, not prophecy, the pressure of a grievance immediately felt and personally measurable in money of the jurisdictional amount. Speculative anticipation that conditions, from which present ills, not now sufficient in amount to give juris-

^{*} Numbers preceded by "B" refer to pages of the table appended to this brief, showing salient characteristics of AFDC programs by states.

diction, flow, may in time aggregate the necessary amount, will not support jurisdiction."

Oestereich v. Selective Service System, relied on by petitioners (Br. p. 27), is of no assistance to them. There this Court specifically remanded the proceedings to determine whether the plaintiff could satisfy § 1331.

C. Section 1343 is inapplicable here since the deprivation of no civil right is alleged here.

The Court of Appeals also properly rejected petitioners' attempt to invoke 28 U.S.C. § 1343 here. There was, and can be, no claim here of "deprivation of any right, privilege or immunity secured by the Constitution . . or by any Act of Congress providing for equal rights" (§ 1343[3]). As the Court noted, the complaint made no such allegation since petitioners "have no rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all" (226). Section 1343 was enacted to fortify the Fourteenth Amendment (Hackin v. Lockwood, 361 F. 2d 499 [9th Cir. 1966], cert. den. 385 U. S. 960) and clearly has no applicability here. New York v. Galamison, 342 F. 2d 255 (2nd Cir. 1965), cert. den. 390 U. S. 977: Bradford Audio Corp. v. Pious, 392 F. 2d 67 (2nd Cir. 1968). There is no constitutionally protected right to receive welfare allowances, let alone at any particular level. The inapplicability of § 1343 is patent. Clark v. Washington, 366 F. 2d 678 (9th Cir. 1966); Howard v. Higgins, 379 F. 2d 227 (10th Cir. 1967); Booth v. General Dynamics Corp., 264 F. Supp. 465, 470 (N. D. Ill. 1967).

Moreover, § 1343 may not be used as a vehicle to raise claims of a monetary nature. Gray v. Morgan, 371 F. 2d 172 (7th Cir. 1966), cert. den. 386 U. S. 1033; Abernathy v. Carpenter, 208 F. Supp. 793 (W. D. Mo. 1962), aff'd 373 U. S. 241; Alterman Transp. Lines, Inc. v. Public Service Commission, 259 F. Supp. 486, 492 (M. D. Tenn. 1966), aff'd 386 U. S. 262, reh. den. 386 U. S. 1014.

It would be ludicrous to describe § 602(a)(23) as "an Act of Congress providing for the equal rights of citizens" within § 1343(3). In fact if fortifies the utterly unequal scheme of welfare allowances which exists in the various states and which has been left untouched by Congress, and under which New York and a few other states pay AFDC allowances vastly higher than those of other states-and a majority of the states are actually permitted to pay less, in most cases far less, than their own announced standards of need. As we have seen, while New York pays an average of \$278.00 (including rent and fuel for heating) to a family of four on AFDC, Alabama pays \$89.00 and Mississippi \$55.00 (See Table). Furthermore, the system of special grants which petitioners seek to reinstitute provided repeated instances of unequal treatment among AFDC recipients within a State.

Section 1343(4), also relied on by petitioners, is not helpful to them. That section permits suit for damages or equitable relief under an Act of Congress providing for protection of civil rights, including the right to vote. Not only is no such statute involved here, but, in any event § 1343(4) is "merely [a] technical amendment to the Judicial Code so as to conform it with amendments made to existing [substantive] law by the preceding section of the bill" (the Civil Rights Act of 1957). See U. S. Code Cong. and Admin. News, 85th Cong. (1957), p. 1976, House Rep. No. 291.

D. Section 1983 fails to support an attack on a State legislative act.

42 U.S.C. § 1983 was likewise properly held not to confer jurisdiction here. That section must be read with § 1343 and, like it, may not be employed as a means of obtaining jurisdiction of an alleged loss of money. Howard v. Higgins, 379 F. 2d 227, 228, supra; Bradford Audio Corp. v. Pious, 392 F. 2d 67, 72, supra; New York v. Galamison, supra.

In addition, as the Court of Appeals ruled, respondents, a State official and Department, are not "persons" within the meaning of § 1983 in an action of this sort, where the complaint constitutes an attack on a statute, not on any act of respondents. Clark v. Washington, supra, 366 F. 2d 678, 681; Williford v. California, 352 F. 2d 474 (9th Cir. 1965).

E. The doctrine of pendent jurisdiction was inapplicable here where the sole constitutional claim was dismissed in the earliest stages of the litigation.

The District Judge, in an attempt to cling to this action despite the lack of any jurisdictional toehold, relied on the doctrine of pendent jurisdiction as set forth in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). That decision provided no authority for the acquisition of jurisdiction by the District Judge once the only Court which had jurisdiction of the constitutional claim-the 3-judge Court-was dissolved. Dissolution of the 3-judge Court was clearly proper and was correctly affirmed by the Court of Appeals (220-221). The equal-protection issue was rendered moot by the amendment to § 131-a(4) which authorized respondent Commissioner to increase the level of allowances in any county to the New York City level, which provided those petitioners resident outside New York City with an available remedy in the state courts to compel respondents to raise the level of their allowances. As the Court noted (220), in fact the Commissioner did, shortly thereafter, increase the levels of payment to AFDC recipients in Nassau County, where the petitioners here involved resided.

Subsequently, Rothstein v. Wyman was commenced (see p. 14, fn., supra), raising the equal-protection claim alone. It was originally brought by recipients of adult welfare assistance. The Court preliminarily enjoined respondents from paying higher allowances to City than to non-city recipients. By order dated October 22, 1969 it permitted AFDC recipients to intervene on behalf of their

class, and extended the injunction to them. These orders are now on appeal to this Court. The pendency of that suit and the injunctions completely protects the present petitioners, and would moot the equal-protection issue here even if it were not already moot. We earnestly submit, moreover, and will contend on the appeal from these preliminary injunctions, that the slight difference in schedules between New York City and other welfare recipients was a valid exercise of legislative discretion, based on recognition of the greater real social cost of living in New York City where even minimal recreational facilities for children are typically distant, and the need for laundry, locks, and other items greater. rational legislative policy does not violate the Equal Protection Clause. McDonald v. Bd. of Election Commissioners, 394 U. S. 802 (1969); McGowan v. Maryland, 366 U. S. 420 (1961); Lampton v. Bonin, 299 F. Supp. 336, 342-344 (E. D. La. 1969).

After the dissolution of the 3-judge Court here there could be no pendent jurisdiction in the single District Judge, who was not empowered to consider the Constitutional claim in the first place.

As the Court of Appeals stated (221-222):

"Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge Court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge Court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power."

Even if the pendent jurisdiction doctrine were applicable, it is, as this Court held in United Mine Workers

v. Gibbs, discretionary only. And here, even if the pendent jurisdiction doctrine could be employed, its use was improvident on the very grounds of comity and predominance of state issues referred to in Gibbs (pp. 726-727; fn. 15). See also McFaddin Express, Inc. v. Adley Corp., 346 F. 2d 424, 427 (2nd Cir. 1965); Peace v. City of Center, 372 F. 2d 649 (5th Cir. 1967).

It was, as the Court of Appeals found, an abuse of the District Judge's discretion to retain jurisdiction over the statutory contention—especially where there existed no authority for the litigation of the latter claim in the District Court. In *United Mine Workers* v. *Gibbs, supra*, the very case relied on by the District Judge, this Court expressly stated (383 U. S. at 726-727):

"Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surerfooted reading of applicable law. Certainly if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." (Emphasis supplied.)

For these reasons the Court of Appeals found retention of this suit under the guise of pendent jurisdiction to be particularly "inappropriate here, where, whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare. A federal court should not assert such power over a state legislature unless there is no possible alterna-

tive. Even if the district judge had had discretion, he should have refused to rule on the statutory claim" (222).

The Constitutional claim was never seriously pressed by petitioners. They actively opposed the convening of the three-judge Court (259-271). Petitioners' counsel acknowledged in opposing the three-judge Court that the equal protection claim was tacked on as a device for obtaining jurisdiction (269):

"I think it plain that our two claims here are discrete and severable, though they form part of one case only in a pending [sic] jurisdiction case."

To sanction that device would truly be "to wag the jurisdictional dog by his non-jurisdictional tail"—a practice condemned as "improper and clearly subject to jurisdictional attack upon appeal." United States v. General Ins. Co., 247 F. Supp. 543, 546 (N. D. Cal. 1965). This is especially so since the District Judge himself concurred in the dissolution of the three-judge Court (133, 136). Since the proof in support of the two claims was disparate, retention of the case was plainly improper (Musher Foundation, Inc. v. Alba Trading Co., Inc., 127 F. 2d 9, 19 [2nd Cir. 1942]). Moreover, an important consideration in determining whether pendent jurisdiction should be invoked is "the proper function of a federal court in our federal system"

^{*} That case aptly held it "axiomatic" that the pendent jurisdiction doctrine "ought to be strictly applied. The doctrine of pendent jurisdiction was never intended, nor should it be used, as a free ticket to federal jurisdiction." It quoted with approval Walters v. Shari Music Pub. Corp., 193 F. Supp. 307, 308 (S.D.N.Y. 1961), which dismissed a pendent non-federal issue where the federal issue had been dismissed on a motion for summary judgment:

[&]quot;* * there is a considerable difference between a federal claim which fails during trial and one which has been dismissed on pre-trial motion. In the latter situation—the one presented in this case—there has been no substantial commitment of federal judicial resources to the state claim at the time the federal claim is rejected."

(United States v. Gregor J. Schaefer Sons, Inc., 272 F. Supp. 962, 967 [E.D.N.Y. 1967]). What the District Judge did here was explicitly condemned in United Mine Workers v. Gibbs, which held that "recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case." 383 U. S. at 727.

F. The Eleventh Amendment bars this suit to invalidate a State statute, particularly in the field of financial administration.

In addition to the absence of any affirmative jurisdictional basis under any federal statute, the Eleventh Amendment and basic principles of sovereign immunity stand as a complete bar to this action. This is a case in which defendants Wyman and the Department of Social Services are named only in their official capacity. No wrongdoing or tortious act of theirs is alleged. Nor is there any Constitutional question. The sole contention is that the State statute is invalid. In such a case the Eleventh Amendment forbids suit in the federal courts. Parden v. Terminal Ry. of Alabama, 377 U.S. 184, 186 (1964); Clark v. Washington, supra, 366 F. 2d 678, 680. The fact that New York State was not expressly named as a party defendant "is immaterial, as the Eleventh Amendment applies to all cases in which the state is a real, even though not a named, party defendant." Meyerhoffer v. East Hanover Tp. School Dist., 280 F. Supp. 81, 84 (M. D. Pa. 1968); Parden v. Terminal Ry., supra.

As this Court held in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 54 (1944), "where we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." See also *Taylor* v. *Cohen*, 405 F. 2d 277, 281 (4th Cir. 1968);

Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 695 (1949), reaching the same conclusion on principles of sovereign immunity alone, in suits against federal officers where the Eleventh Amendment does not apply.

In Williams v. Dandridge, 297 F. Supp. 450 (D. Md. 1968), prob. jurisd. noted Oct. 13, 1969 (38 LW 3115), the three-judge Court, while allowing the action since a denial of equal protection was asserted, specifically held that "to the extent that the prayers of the complaint might be construed to require the Governor and General Assembly of Maryland to appropriate additional moneys to make larger payments to plaintiffs, such relief was barred by the Eleventh Amendment." 297 F. Supp. at 452, fn. 1. See also id. at 459 (quoted on p. 60 of this brief).

Even in King v. Smith, this Court expressly noted (392 U. S. at 312, fn. 3) that "we intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." This suit was clearly improper under these fundamental doctrines.

Moreover, King v. Smith, unlike this suit, involved a challenge to an administrative regulation which was promulgated by the defendant commissioner (or his predecessor), and could have been repealed by him in his discretion. Here a statute is attacked, which respondents must administer and are without power to alter.

G. The pendency of proceedings before HEW rendered it improvident for the District Judge to have exercised jurisdiction here.

It is undisputed, and the Court of Appeals repeatedly noted (223, 233-234), that HEW has commenced its own administrative proceeding to determine whether § 131-a conforms to the Social Security Act's provisions. It has

requested respondents to provide detailed information regarding the statute (108 et seq.) which respondents have supplied (139-142, 143, 166), and, pursuant to 42 U.S.C. \$\infty\$ 601 et seq., must determine whether the statute conforms to federal standards for eligibility to receive federal funds. It is plain that HEW is the federal administrative agency with primary jurisdiction here and under basic principles the courts should defer to HEW's expertise in this area. Its determination would be judicially reviewable by any party aggrieved, as Judge Lumbard noted (234).

Petitioners, insisting that HEW be short-circuited, rely on King v. Smith. But the posture of this case is in sharp contrast to the situation in King v. Smith, where HEW had for years approved the challenged Alabama regulation. Here, irrespective of this litigation, HEW must for the first time itself determine whether § 131-a meets its requirements for New York's eligibility in the federal program. There is no suggestion that this review was delayed or that HEW might use improper standards.

In such a situation this suit, unlike King v. Smith, was premature. For this reason respondents moved to join HEW, which has primary jurisdiction over the highly technical question posed by this litigation, as a necessary party defendant (Fed. R. Civ. Pro. 19[a][1]), both because of its primary jurisdiction or at least expertise to which the judiciary should in the first instance defer (see Catholic Medical Center v. Wyman, — F. pp. — [E.D.N.Y., 69 Civ. 641, 3-judge Ct.]),* and also because

^{*}In that case, the Court (FRIENDLY, C.J., MISHLER, D.J. and JUDD, D.J.) confronted with a challenge to a 1969 New York statute temporarily freezing the State rate of reimbursement for hospital services furnished medicaid patients, by decision dated October 21, 1969 deferred determination as to the validity of the statute (claimed to violate the Constitution and Social Security Act provisions) "until the United States Secretary of [HEW] has an opportunity to express his views." The Court went on:

New York's eligibility for federal aid is the only proper issue raised by the alleged conflict between \$602(a)(23) and § 131-a and thus, without a responsible federal official. "a final decree cannot be rendered between the other parties * * * without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." Turner v. Brookshear. 271 F. 2d 761, 764 (10th Cir. 1959). The motion to join HEW was denied by the District Judge (34-36). But the Court of Appeals recognized that HEW, "now engaged in a study of the relationship between Section 602(a)(23) and Section 131-a," possessed "acknowledged expertise" in the specific field and "is far better equipped than the federal courts to review [the] alleged inconsistency" (223). United States v. Western Pacific R. Co. 352 U. S. 59 (1956); United States v. Manufacturers Hanover T. Co., 240 F. Supp. 867, 882 (S.D.N.Y. 1950). The issue sought to be litigated here is clearly within the scope of the special knowledge and experience of the agency. Moreover, this is a case in which HEW must deal with an intricate program affecting all 50 States and involving various and competing policy considerations—a situation not conducive to judicial intervention on a case-by-case basis. See World Airways, Inc. v. Northeast Airlines, Inc., 349 F. 2d 1007, 1010 (1st Cir. 1965), cert. den. 382 U. S. 984.

Grant-in-aid programs in general, and the AFDC sections of the Social Security Act in particular, regulate the

(footnote continued from previous page)

"There is precedent for holding a case until an administrative determination can be made. Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 619 (1944).

"Since H.E.W. is not a party to this litigation, it seems proper to defer decision of the motions for a short period in order to hear from the Department. It may be that H.E.W. has dealt with similar problems in some other state, that it has relevant negotiations underway, or that it will point to some part of the statutory scheme for its participation that we have overlooked."

relationship between the federal agency and the State government and do not directly create justiciable issues between an individual and the state government. This is not a case where there has been extended inaction by the agency. See King v. Smith, supra. At least in the first instance the administrative agency should assess the complicated factual issues with which the Court below was grappling. See Secretary of Agriculture v. Central Roig Refining Co., 338 U. S. 604, 618 (1950). For this reason alone, all else aside, the complaint was properly dismissed.

POINT II

The Court of Appeals properly held that New York's AFDC program fully complied with any reasonable interpretation of 42 U.S.C. § 602(a) (23). That subsection does not, and was not intended to, fix mandatory levels of payment or empower the judiciary to invalidate a State statute establishing levels of welfare payment.

Even if petitioners had overcome the jurisdictional obstacles to this suit, the assault on New York's welfare allowance statute would still fail. Neither the wording nor the background of § 602(a)(23) justify the extraordinary burden petitioners seek to place upon it. New York fully complied with it. And aside from the ample demonstration of compliance, petitioners' construction of that statute strains it to the breaking-point.

New York's welfare program long antedated the Social Security Act of 1935 and its levels of payment have always outpaced whatever federal standards existed. The present New York allowances, both before and pursuant to the 1969 legislation, have consistently been, and are, the nation's highest (B-2, infra). Indeed, it was New York's Public Welfare Law of 1929, which shifted the emphasis in welfare from institutional care to meeting the needs of

dependent children in their own homes, which was the precursor of subsequent federal legislation. In the specific field of AFDC New York's level of payments exceeds every other state's as we have seen (pp. 11-12, supra). New York has always paid the full standard of need to every AFDC recipient. It has never imposed a maximum amount on aid to families, a residency requirement for eligibility, or a substitute-father provision. It has always paid identical allowance to all welfare recipients without distinction between AFDC and others. ** It has consistently been the vanguard of enlightened and progressive legislation in the social-welfare field, and the institution of this suit by the National Welfare Rights Organization challenging its levels of payment is ironic. Petitioners themselves acknowledge that New York is "a leadership state in AFDC" (Br., p. 33).

The Social Security Act provisions governing federal participation in the States' AFDC programs are significant for what they omit. Congress has never exercised its undoubted power to regulate, as a condition of federal grants, the amounts paid by the States under their AFDC programs. It has never even required States to pay their full professed standard of need, or established minimum amounts for such standards of need. As this Court noted in King v. Smith (392 U. S. at 318), "each State is free to determine the level of benefits by the amount of funds it devotes to the program." Thus a situation has been permitted by Congress to continue in which both the standards of need fixed by the States, and the actual allowances

^{*} New York's rate of assistance far exceeds that found by Congress to be an adequate level for the District of Columbia. A family of four in New York received \$278 per month in 1968; a similar family in the District of Columbia received \$184.

^{**} In fact, petitioners complain that New York City recipients, who include a disproportionately high number of AFDC recipients, receive more than those outside the City where relatively fewer welfare recipients are in that category.

paid, vary enormously. In this context it is disingenuous for petitioners to speak of "paramount" federal law and "pervasive federal concern" (Br. pp. 22, 24) where Congress has so totally refrained from action.

Petitioners, as did the District Judge, attempt to paint AFDC as a coherent, unified national program in which the federal government plays a major role in determining levels of allowances. See, e.g., Pet. Br. p. 11, speaking of "national program objectives." This is palpably at odds with the facts. There are, as a result of Congress' failure to establish national standards for allowances, 50 separate state AFDC programs (together with the District of Columbia, the Virgin Islands and Puerto Rico) of enormously disparate levels of payment. See table appended hereto. The only nationwide pattern is that required by the Constitution (see, e.g., Shapiro v. Thompson) or by the provisions of the Social Security Act itself, which distinctly avoids regulation of state levels of payment.

Section 602(a)(23), upon which petitioners totally rely here (except for the mooted equal protection claim), in its entirety states:

"[The states shall] provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

The plain wording of this section is that "the amounts used by the state to determine the needs of individuals"—the standard of need of each state—and any maximum imposed on the total paid to families are to have been increased by July 1, 1969 "to reflect fully changes in living costs since such amounts were established."

The maximum on aid to families may be excised from this case. New York has never imposed, and does not now impose, any family maximum. And New York has annually adjusted its standard of need to reflect living costs, and did so in 1968, in compliance with § 602(a) (23). The levels of payment embodied in the statute at bar were based on these 1968 administratively-established levels and fully reflected the 1968 cost-of-living adjustment (90, 102-105). They completely comply with the provisions of § 602(a) (23).

As we have shown, and as the Court of Appeals stated (231), the levels contained in § 131-a represent a valid legislative determination to adopt the universally-approved flat-grant system and eliminate the invidious, administratively unwieldy patchwork of monthly allowances and special grants which previously existed. As the record shows, the special-grant arrangement gave undue advantage to the more sophisticated welfare recipients and to those to whom legal services were more readily available. It consumed huge portions of the time of caseworkers and State and county welfare officials in determining eligibility for special grants and administrative appeals from denials of special grants. Adoption by New York of the flat-grant approach freed these people for counseling activities.

Moreover, the averaging of ages of oldest children alone relieved State and local officials of the necessity of recomputing the monthly allowance of every AFDC family—886,000 recipients as of 1968—whenever its oldest child reached a higher bracket (every two years in most cases).* This alone was a herculean administrative

^{*} Petitioners express concern for "the greater nutritional, social and educational needs of older children" (Br., p. 14) but ignore the additional costs of layette, pharmaceuticals, etc. in the case of infants. This is precisely the sort of determination which should be left to the expertise of the officials actually administering the program.

task, time-consuming, and unfair to recipients when the local officials failed to promptly increase their allowances. The New York Legislature had every right to adopt the more enlightened, administratively streamlined flat-grant system, and its acts are entitled to a strong presumption of validity (Ferguson v. Skrupa, 372 U. S. 726 [1963]; McDonald v. Bd. of Election Commissioners, 394 U. S. 802, supra). Especially where a conflict between state and federal law is asserted, a powerful presumption runs against such conflict even in fields where federal law is clearly paramount. See Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U. S. 35 (1966), reh. den. id. 967.

For these reasons there was, as the Court of Appeals held, full compliance by New York with the requirements of § 602(a)(23). The plain meaning of that terse, unambiguous amendment, as we have shown, is that each State was to increase its standard of need, and family maximum if any, during the period specified—and this New York did. That finding is bolstered by the legislative history of the subsection. As proposed by the administration, it would have been the significant shift in the federal government's anachronistic policy of laissez-faire with regard to State levels of welfare allowance which petitioners, indulging in wishful thinking, insist it to have been.

The bill was originally designed to require each State to pay its entire standard of need. This itself would have comprised a massive change in the pattern of welfare payments throughout the country. Numerous states, including several in which the number of welfare recipients is high, pay amounts far below their admitted standards of need. See the table reproduced as an appendix to this brief, and HEW's chart (106). We have already noted that Alabama's standard of need for a family of four on AFDC is \$177 but the allowance actually paid is \$89. Missouri's standard of need is \$305 but it pays \$124. (See fn., p. 12, supra.)

^{*} H.R. 5710 (90th Cong., 1st Sess.) § 202.

In addition, the proposed amendment would have required each State to increase its standard of need—and therefore its amount actually paid—annually henceforth. These proposals reflected HEW's expressed concern that in some states allowances were so low that those states did not even meet their own professed standards of need. See the Section-by-Section Analysis of H.R. 5710 prepared by HEW for the House Committee on Ways and Means, pp. 36-39°; Statement by John W. Gardner, Secretary of HEW, before Committee on Ways and Means on H.R. 5710, March 1, 1967, p. 3; Statement by Secretary Gardner on H.R. 12080 (90th Cong., 1st Sess.) before Senate Committee on Finance on August 22, 1967, pp. 7-9.

HEW never recommended that a floor be placed on the states' existing levels of assistance. Indeed, such a policy would have been counter-productive, only solidifying the extraordinary inequities in the welfare programs of the various states. Thus, petitioners' repeated citations to the Department's concern for the low levels of assistance are non-sequiturs here. Their construction of the statute could not eliminate these glaring inequalities in any event.

Nonetheless, the concern of HEW for low levels of assistance was not the concern of Congress. The House of Representatives rejected the administration bill and substituted its own, H.R. 12080, which contained no requirement with regard to standard of need or levels of assistance for AFDC recipients at all.

The Senate, however, passed a bill requiring annual updating (as HEW had requested), but not requiring full

^{*} Petitioners have cited this document as if it were a Committee report. See, for example, Pet. Br. p. 32, fn. 26. In fact, however, the face of the Section-by-Section Analysis contains the following caveat:

[&]quot;* * * printed for informational purposes only, so as to make the material contained therein generally available. Neither the bill nor the analysis and explanation thereof has been considered or endorsed by the Chairman or any Member of the Committee on Ways and Means."

payment by each State of its standard of need, or even increases in standard of need. The Senate Finance Committee, in dealing with the AFDC program, also emphasized its concern with the increasing number of recipients (Report of Senate Finance Committee to accompany H.R. 12080, No. 744, November 14, 1967, U.S.C. Cong. and Admin. News, 90th Cong., 1st Sess. [1967], p. 2981). That report contains no expression of concern over the low levels of payments to AFDC recipients. No reference is made to § 213(b) (the enactment of § 602[a][23]) in any summary within that lengthy report. It is described only in the Section-by-Section Analysis as requiring (id. at 3133):

"a State plan for the dependent children program to provide that by July 1, 1969, and at least annually thereafter, the amounts used by the State to determine the needs of individuals will be adjusted to reflect fully changes in living costs since such amounts were established, and that any maximums that the State imposes on the amount of aid paid to families will be proportionately adjusted."

By contrast, the Committee did require an increase in the actual payments made to recipients of old-age assistance. With regard to the aged, the Committee described § 213(a)(1)(D) as requiring (id. at 3132):

"a State plan for old-age assistance, effective July 1, 1968, to provide that the standards used for determining the need of applicants and recipients for and the extent of such assistance under the plan, and any maximum on the amount of assistance, will be so modified that an increase in the amount of assistance and other income will not be less than \$7.50 per month per individual (determined on an average per in-

^{*}This increase was mandated because Congress was concomitantly providing increases in social security payments which would decrease the budget deficit for many such persons. For AFDC, the states received no such additional federal resources. On the contrary, Congress was attempting to limit expenditures for AFDC.

dividual in accordance with standards prescribed by the Secretary) above such amount of assistance and other income available under the standards and maximum applicable under the plan on December 31, 1966." (Emphasis supplied.)

Thus, with regard to AFDC the amounts used to determine the needs were to be adjusted and any maximums proportionately adjusted, whereas with regard to the aged, the standards used for determining the needs and any maximums were to be "modified" so that there was an actual mandated increase of at least \$7.50 per individual. This was a substantial amendment and was given a great deal of attention by the Senate Committee (e.g., id. at 3006-07). The Senate explicitly rejected as too costly a parallel increase for AFDC recipients amounting to \$4.00 per month per person. 113 Cong. Record 16963-64 (Nov. 21, 1967; daily ed.).

The HEW bill (H.R. 5710) contained a \$60,000,000 appropriation for fiscal 1970 alone—persuasive proof of the far-reaching change it was to have wrought in equalizing the crazy-quilt of welfare allowances. See HEW's amicus brief in Lampton v. Bonin (299 F. Supp. 336 [E. D. La. 1969]) (A-24), outlining in detail the legislative history of \$602(a)(23). Moreover, Senate Finance Committee hearings yielded estimates that these requirements of the original bill would entail additional costs to the federal government of \$150,000,000 annually if the states were to pay their full standard of need (as New York has always done), and an additional \$100,000,000 more per year to cover the annual updating. For AFDC alone, the figures were \$95,000,000 and \$90,000,000, respectively (A-23, 24).

However, the Senate Finance Committee's estimate for appropriations conclusively refutes any notion that the new amendment would affect AFDC expenditures. The Senate estimated its expenditures for the fiscal year 1968

and for the fiscal year 1972 for AFDC costs. (U. S. Code Cong. and Admin. News [1967], supra, p. 3012.) There was no difference between the House bill and the Senate Committee bill despite the inclusion of § 602(a) (23) in the latter. There was only a very moderate increase in projected expenditures between 1968 and 1972. The Committee specifically stated that its cost assumptions were "based on the experience of the past several years; allow[ing] increase of \$1 each year in the average monthly payment per recipient, in line with recent experience" (id. at 3012). In effect, petitioners are asking the courts to overrule Congress' decision not to appropriate these millions of dollars.

This stark reduction in the effectiveness of the proposal is dramatically illustrated by the Senate vote. The original proposal was carried over the dissent of Senators Bennett, Curtis, Holland, Stennis, Thurmond and Williams (Del.). The final version adopted, following House of Representatives passage and emergence from the conference committee, was approved by all except Senators Brooke, Case, Harris, Hart, Javits, Kennedy (Mass.), Kennedy (N. Y.), Metcalf, Mondale, Nelson, Proxmire, Tydings, Williams (N. J.) and Yarborough. The disparity between these rosters speaks volumes.

Thereafter the Conference Committee further compromised the already modest section and eliminated the requirement for annual updating. Its report (U. S. Code Cong. and Admin. News [1967], p. 3209) stated that §602(a) (23) "would require States to make only one adjustment before July 1, 1969, after which date the provision would not apply." (Emphasis supplied.)

^{*}It is noteworthy that both of New York's Senators went on record as favoring annual mandatory updating by every State. Petioners concede as much (Br. p. 44, fn. 55).

The House vote was not similarly demonstrative since all of the Social Security amendments were voted on there in one package.

The actual bill which this Conference Committee reported—enacted without further change—reveals that the sole purpose of the 1967 amendments was to reduce AFDC expense. Amendments were added to reduce the welfare rolls, to encourage recipients to work, to require deserting fathers to support their families, to increase administrative control over the care of the children in their homes (see, e.g., id. at 2981-3002). This was the very bill which enacted the "AFDC freeze" (H.R. 12080, § 208) which prevented federal financial participation in AFDC payments to the extent that the number of AFDC recipients exceeds the proportion of such recipients to the total under-21 population of any state in the first quarter of 1967.

Thus, the bill that emerged as § 602(a) (23) was the same flask with the wine changed to water. Both the full-standard of need requirement and the annual updating provision had been removed. To characterize these excisions as emasculation would be understatement. All that remained was the provision, enacted by § 602(a) (23) as passed, that the states adjust their standards of need on a one-shot basis, and their family maximums if any. The view of the statute advanced by petitioners is in fact the proposal Congress specifically rejected.

For these reasons the Court of Appeals spoke of "the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the States. The Congressional action was entirely consistent with the traditional federal policy of granting the States complete freedom in setting the level of benefits" (229).

The Court likewise noted that the House Conference Report (No. 1030, 90th Cong., 1st Sess. [1967]), appearing in U. S. Code Cong. & Admin. News (1967) 3208-09, described a comparable provision concerning old-age benefits as requiring "each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable," but—in sharp contrast—discussed § 602(a)(23) as merely requiring each

state to "adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid" (emphasis supplied) (229). See also Senate Committee Rep., id. at 3132.

Further, as the Court observed, § 602(a)(23) was not even mentioned in the Summary of 1967 Social Security Act amendments published by the Senate Finance and House Ways and Means Committees, or in the Senate Finance Committee's Report's "Summary of Principal Provisions" of the 1967 amendments (230-231). As HEW cogently remarked regarding § 602(a)(23) in its brief in Lampton v. Bonin (in a comment quoted with approval by the Court here [A-8]), "The Congress could hardly have paid less attention to it." Yet this is the amendment from which petitioners seek to draw far-reaching powers.

HEW's contemporaneous construction of § 602(a) (23) supports this view. It is axiomatic that the construction provided by the agency charged with the responsibility of enforcement of the Social Security Act is entitled to great weight in eliciting the intent of Congress. Udall v. Tallman, 380 U. S. 1 (1965). HEW's analysis of § 602(a) (23), set forth at length in its Lampton brief (A-1 et seq.), furnishes additional and powerful evidence of legislative intent. It characterizes § 213(b) of P. L. 90-248, which was enacted as § 602(a) (23), as "in part an attempt to avoid the appearance of doing nothing in the ADC program. It was a gesture of uncertain meaning and effect, suggesting on its surface something more than it actually required on closer inspection" (A-25).

Again, the HEW brief noted as "quite significant" that the suggested \$4-per-month across the board increase to all AFDC recipients (to correspond to a projected \$7.50-permonth increase in the adult assistance categories) was "rejected without even a division of the yeas and nays" (A-25). As HEW remarked, "the Senate was unwilling to require what would be an actual cost-of-living increase

of \$4 per month, • • •. The Senators seem to have understood clearly that the requirements of Section 213(b) did not guarantee that ADC recipients would actually receive increased payments" (A25, 26).

If further proof were required, HEW's applicable regulation implementing § 602(a)(23)-45 CFR 233.20(a)(2) (ii) -explicitly permits states unable "to meet need in full under the adjusted standard" to "make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph." The latter subparagraph. requires that "if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide." The plain language of these regulations implementing § 602(a)(23) demonstrates that no more was required than what New York did-and indeed that a State could actually reduce its AFDC payments through ratable reductions consistent with that statute. These regulations were never repudiated or even referred to by Congress. They, together with the wording of the statute and its history, preclude the distortion petitioners seek to impose upon it. Congress' undoubted power to

^{* &}quot;In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards."

^{** &}quot;Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide."

raise AFDC levels was clearly not exercised when § 602(a) (23) was enacted.

This reading of the amendment dovetails with that given by the Court in the second decision in Lampton v. Bonin,

— F. Supp. — (E. D. La. July 15, 1969; WISDOM, C.J. & COMISKEY, D.J.):

"If Congress had intended to require the states to put a floor on current levels of aid and to increase payments to reflect the increase in the costs of living, it would have been obvious to Congress that such requirements would cost the federal government and the states several hundred million dollars and perhaps as much as five hundred million dollars. A bill clearly having this effect would have been a burning issue on the floors of the House and the Senate."

That Court went on to note that the Senate Committee report "refers only to the provision for the adult categories, and is silent on the ADC provision." It added (id.):

"It is also significant that the cost estimates on the bill as agreed to by the Conference Committee (Table 5 of the Joint Publication, page 28) did not reflect anything for section 213. Clearly, no great cost effect was anticipated."

The Court aptly summed up what § 602(a)(23) did and did not do:

"Congress rejected the proposal for meeting need, and retained only the provision that the standard used to determine need be updated." (Emphasis in original.)

It quoted then HEW Secretary Gardner as "complain-[ing]" that "the states are required to set assistance standards for needy persons in order to determine eligibility, but they need not make their assistance payments on the basis of these standards." The Court correctly noted that "[t]he construction HEW places on the statute tips the scales in favor of the defendants," and specifically referred to the regulation authorizing ratable reductions as consistent with the statute.

Petitioners, in an effort to sustain their distortion of the statute, point to its reference to maximums as requiring that the amounts paid to recipients must be increased (Br. pp. 60-72). This is simply a misreading. Maximums "impose[d] on the amount of aid paid to families" is a term of art with a definite meaning in the context of welfare legislation. It refers to dollar maximum amounts limiting the total a family may receive—the provisions held violative of the equal protection clause in Williams v. Dandridge, 297 F. Supp. 450, supra, and Westberry v. Fisher, 297 F. Supp. 1109 (D. Me. 1969). New York has never employed such maximums. The claim that Congress' use of that term could have meant all dollar amounts of AFDC payment is patently absurd and is, all else aside, belied by Congress' use of the phrase "any maximums." Since every state has a schedule of allowances paid, whether by statute or by regulation, the word "any" would have been redundant and indeed ambiguous.

As we have seen, § 602(a)(23) had a purpose, albeit modest. If the updating of state standards of need mandated by this section had no significance, and were "meaningless," as petitioners insist, the National Welfare Rights Organization, which instituted this action and is still represented on petitioners' brief, would hardly have commenced its suit in the District of Columbia against HEW

^{*} There are 19 states with such maximums on aid to families (see Table): Alabama, Arizona, Arkansas, Delaware, Georgia, Kentucky, Louisiana, Maine, Maryland, Mississippi, New Mexico, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia and Wyoming.

(p. 27, supra) to compel the states to update their standards of need in accordance with the statute.

Petitioners' attempted analogy with Medicaid (Br. pp. 56-57) is not helpful to their thesis since the federal statutes there do not regulate the levels of aid dispensed by the States—just as § 602(a)(23) does not. And their contention that § 602(a)(23) as construed by the Court of Appeals, HEW, and the three-judge Court in Lampton v. Bonin is "without meaning" (Br. p. 67) is unpersuasive. The statute achieved its stated, limited purpose—requiring the raising of State standards of need, and family maximums, if any. There is no requirement that Congress solve all the problems in this complex area at once (McDonald v. Bd. of Election Commissioners, supra), however desirable that might be.

New York's compliance with § 602(a)(23) as it actually reads was, as we have seen, complete. The standard of need employed by New York was defined by former 18 N. Y. Code of Rules and Regulations ("NYCRR") § 352.4 as items of basic maintenance. These items comprising the standard of need in New York have not been altered. Their components have, however, been recalculated annually by New York's Department of Social Services, using professional materials from any sources including those from the United States Department of Agriculture. The standard increased by respondents and approved by HEW in 1968 was a current list of products presently available in the stores of the State. See former 18 NYCRR § 352.4.

All items in New York's standard of need are repriced annually in May. Section 131-a specifically requires such repricing by respondents and their report to the State Legislature by January, in time for the oncoming legislative session. If there is a change of prices of more than 2%, the levels of assistance are adjusted to meet that change. Therefore, $\S 602(a)(23)$ was completely irrelevant to New York since it had updated its standards many times since

they had been established. However, assuming § 602(a)(23) required an updating of amounts of need between January 2, 1968 and July 1, 1969 as a prerequisite to federal funding, this was complied with by New York as a matter of course on August 23, 1968 when a new State schedule was adopted pursuant to annual repricing of the approved standard.

Further, § 602(a) (23) requires adjustment by July 1, 1969, which is the effective date of § 131-a.* There is no support for petitioners' assumption that the section, which effectively expires on July 1st, could invalidate legislation which did not become effective until after that date. Congress made it clear that § 602(a) (23) could do no such thing. The Conference Committee Report (U. S. Code Çong. and Admin. News, 90th Cong. [1967], p. 3209) is explicit that the section "would require States to make only one adjustment before July 1, 1969, after which date the provision would not apply."

In addition we have already seen that Congress specifically rejected a provision which would require periodic updating of state standards of need, and explicitly stated that after July 1, 1969 § 602(a)(23) would have no effect. U.S. Code Cong. and Admin. News (1967), supra, at page 49. The fact is that § 602(a)(23) requires but one updating of standards of need "to reflect fully changes in living costs since such amounts were established," and New York did this. In the Lampton amicus brief (A-27-28), the most cogent expression of HEW's construction of § 602(a)(23), the agency explicitly rejects the suggestion that the section in any way precludes contrary legislative action by the States after July 1, 1969:

"This presents a problem as to how long the State's action must be sustained. Forever? Five years? One

^{*} July 1st is a date frequently used for the inception of New York legislation. It falls after the adjournment of the Legislature and gives the Department of Social Services and its local counterparts three months to effectuate its provisions.

year? Less? If the States had been required to reprice their standards every year, it would have been clear that no backsliding was to be allowed. But a one-time action to meet conditions at a specified date is soon overtaken by the press of later developments. There is no indication that the Congress was imposing an immutable, permanent adjustment of payments, regardless of the condition of the State's ADC program or the State's financial condition. This, in turn suggests that, in 1969 itself, room was being left for the play of these factors."

Moreover, § 131-a, although characterized by petitioners as legislating "cutbacks" in welfare allowances (see e.g. Br. p. 12), utilizes the same standard of need as did the levels of payment under § 131 prior to July 1st, as to which no suggestion of non-compliance is made. As we have stated, § 131-a represented the adoption of the flatgrant system based on the repriced 1968 standard of need. averaging ages and eliminating special grants in conformity with the proposals of every enlightened commentator in the field (pp. 7-9, supra) and specifically with the proposals of HEW itself as early as 1964 (p. 8, supra), which urged both age-averaging and abolition of special grants. HEW approval of state standards of assistance is required. unlike state levels of payment. And HEW does not require any provision for special needs by the states. In fact its policy is to disfavor special grants. Emergencies need not be dealt with by special grants. They may, as New York does, be handled through purchase of services. NYCRR § 352.5. Thus special grants by definition exceeded the standard of need and are uninvolved here. But New York compensated for their elimination by substituting a flat increase of \$4.50 per individual per month (93).

In the field of welfare as well as economic regulation the states are and should be, concomitant with the federal

system and to keep that system viable, permitted wide rein in experimenting to find the best solutions to their problems—so long as such experimentation does not transgress constitutional bounds. And petitioners allege no such transgression here.

The strong presumption supporting the validity of the state statute and the equally powerful presumption against conflicts between state and federal law (see p. 45, supra) were glossed over by petitioners and by the District Judge. But neither has been rebutted. And here, where the statute is challenged as violating an extremely limited and technical law, the presumption in its favor increases manyfold. What the District Judge attempted here was judicial legislation, expressly condemned, in the context of welfare, in Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), aff'd 393 U. S. 323. The welfare policy sought to be enacted by the plaintiffs in that case was of a far more limited sort than that which petitioners urge here, yet that 3-judge Court restrained itself in deference to the legislative branch (281 F. Supp. at 862, 863):

"The plain flaw that nonetheless destroys plaintiffs' thesis is that it is brought to the wrong forum. Plaintiffs' complaints might move us to vote for changes if we sat as state legislators. But they do not approach the showing of irrationality or arbitrariness warranting exercise of the limited veto power of the federal judiciary under the Fourteenth Amendment.

Against plaintiffs' views, as defendants point out, there are arguments of policy which can scarcely be dismissed as frivolous, whether or not we would find them convincing if the judgment of policy were for us.

It is appropriate from time to time to appreciate the full measure and continued vitality of what Mr. Justice Holmes meant when he said: 'The 14th Amendment does not enact Mr. Herbert Spencer's

U. S. 45, 75, 25 S. Ct. 539, 546, 49 L. Ed. 937 (1905) (dissenting). Now that his dissenting thought has won the day, we ought not to trivialize the achievement by viewing it only as the interment of Spencer's social doctrines. The principle applies to the social philosophers that most of us, including judges, find more persuasive than Spencer. If we were free to enforce what we may modestly deem our more enlightened view, we might seriously consider the changes plaintiffs propose. But we have no such power, and it is better in the end for everyone that this is so. • •

The principle counsels that it is not for federal judges to be 'liberal' or 'conservative' in advancing and ordering measures which undoubtedly relate to basic matters of human decency and welfare. The constricted test in this forum is one of minimal rationality."

See also, in addition to Ferguson v. Skrupa, supra, Osborn v. Ozlin, 310 U. S. 53, 66 (1940) (Frankfurter, J.):

"For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

Petitioners demand that this Court override that principle, overturn the strong presumption of validity of a state statute, and invade the core of State legislative power—control of its own appropriations (Great Northern Ins. Co. v. Read, supra, 322 U. S. at 54)—and all this in the utter absence of any justiciable constitutional claim. The injunction issued by the District Judge at petitioners'

suit transcended the outer limits of judicial power. Did he have authority to order the appropriation of additional moneys (in vast amounts) by the state legislature? The Court of Appeals correctly saw (222) that "whatever the technical consequences of enjoining enforcement of Section 131-a may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare. A federal court should not assert such power over a state legislature unless there is no possible alternative." There was no such Pandora's Box in King v. Smith or Shapiro v. Thompson, where invalidating the state regulations there involved did not, as it would here, categorically require the appropriation of State moneys. In Williams v. Dandridge, the Court, although invalidating Maryland's maximum limit on aid to families, halted at the brink of ordering appropriation of state funds (297 F. Supp. 450, 459):

"Lest our holdings be misunderstood, some additional words are required. We do not hold that Maryland must appropriate additional funds to support its participation in the program of AFDC; we reiterate our previous holding that the Eleventh Amendment deprives courts of the United States from jurisdiction to grant such relief.

"We hold only that if Maryland has appropriated insufficient funds to meet the total need under AFDC, as measured by the standards for determining need that Maryland has prescribed, Maryland may not, consistent with the Social Security Act or the equal protection clause, correct the imbalance by application of the maximum grant regulation. No other proposed solution to this problem is before us, and we express no other opinion."

See, to the same effect, Westberry v. Fisher, supra, 297 F. Supp. 1109, 1116:

"Maine is free to take reasonable steps, as others have done, to allocate on a non-discriminatory basis its resources available for AFDC."

It is anomalous that petitioners request that this Court capsize the Eleventh Amendment and order the appropriation of State funds in an assault against the State which has consistently maintained the highest levels of payment to AFDC recipients, while receiving the lowest proportion of federal contributions. Yet petitioners insist § 602(a) (23) in some unexplained way requires New York to nail to its masthead foreover the precise scheme of AFDC payments which happened to be in effect in 1968. See Securities & Exchange Commission v. Chenery Corp., 332 U. S. 194, 200-201 (1947). Indeed, an interpretation of § 602-(a) (23) such as petitioners seek, which would invalidate the nation's highest level of payment while allowing other states to pay small fractions of New York's amount, might well itself raise a serious issue of denial of equal protection. Such criticism, based on the wide gulf in payments as between various states, has already been mounted. See testimony of Secretary of HEW John W. Gardner, House Committee on Ways and Means, March 1, 1967, in support of H. R. 5710 (administration bill), pp. 3-4, and before Senate Finance Committee on H. R. 12080, August 26, 1967, pp. 7-8. See also table appended to this brief.

What petitioners attribute to § 602(a)(23)—an effect far beyond the import of its wording or any Congressional intent—is an expression (completely unvoiced in the actual statute) of intent to sharply alter the balance between the federal government and the states. Such an "intention to disturb the balance is not lightly to be imputed to Congress." Apex Hosiery Co. v. Leader, 310 U. S. 469, 513 (1940).

Although petitioners have maintained a drumfire of criticism of the State legislature (Br. pp. 14, 72), its motives

are, as this Court has repeatedly held, not a proper subject for judicial scrutiny. Ferguson v. Skrupa, supra. The Legislature had every right to consider the spiraling of costs of welfare and the grip of the vicious cycle of poverty on its recipients—matters of concern to all enlightened citizens and expressly made the subject of Presidential concern in the recent proposals of the President in the field of welfare, which take arms for the first time against the enormous disparities in levels of payment among the states.

New York is the highest taxed State in the nation and New York City is the highest taxed locality. Welfare is the largest item in New York's budget and AFDC is the largest item in the welfare budget. More people receive AFDC in New York State than in any other state. New York's payment per AFDC recipient is the highest in the country. Indeed, the State's payment for AFDC per capita population is an astounding \$39.15, and New York City's an astronomical \$66.12. It would have been negligent for the Legislature not to attempt to streamline this program, to cut its bureacratic costs and to insure that all recipients are treated equally to the extent possible.

The Legislature was allocating finite resources. It authorized \$50,000,000 for day care centers (S. Bill No. 4568-A, 1969 Session) and provided for tuition payments for foster children, thus attempting to break the cycle of poverty rather than perpetuate it. In addition, the elimination of special grants and age differentials and the \$7,500,000 appropriated by New York for administering the food-stamp program are forward-looking programs and should be fostered, not inhibited. Day-Brite Lighting, Inc. v. Missouri, 342 U. S. 421, 423 (1952).

Congress has deliberately refrained from establishing mandatory levels of AFDC payments for the states. It has, as this Court stated in *King* v. *Smith*, in language written after the enactment of § 602(a) (23), left each State

"free to set its own standards of need" and "to determine the level of benefits by the amount of funds it devotes to the program" (id. at 318-319). Despite this Congressional abstention and the burdens it has placed on New York's State government, municipalities and taxpayers, New York stands in the forefront of all states in its levels of welfare payment and in the total amounts spent by it on welfare. Petitioners' claim that New York has acted in contravention of a subsection which was enacted without cost appropriation by a cost-conscious Congress, and completely devoid of the far-reaching powers with which they seek to clothe it—and that such contravention invalidated New York's entire social welfare program—is without substance.

CONCLUSION

The order appealed from should be affirmed.

Dated: New York, New York, November 7, 1969.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Respondents

Samuel A. Hirshowitz First Assistant Attorney General

PHILIP WEINBERG
Principal Attorney

Amy Juviller
Assistant Attorney General
of Counsel

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APPENDIX

TABLE OF AFDC PROGRAMS

Description of individual AFDC programs listed in descending order of average monthly payment per recipient.

There follows a list of the 54 public assistance programs throughout this country and the United States average listed in the descending order of the average monthly payment of the recipient. The 54 districts include all 50 states plus the District of Columbia, Guam, Puerto Rico and the Virgin Islands. Under each district is listed the following information (derived from the indicated sources, most of which are vertical charts which appear in the main appendix):

- I. Average monthly payment per recipient as of June, 1968 (117).*
- II. Amounts expended per inhabitant for AFDC payments for the fiscal year ending June 30, 1968 (119).
- III. Monthly cost standards for basic needs for a family of four recipients as of April, 1968 (106).
- IV. Amount paid to a family of four recipients as of April, 1968 (106).
- V. Percentage of public assistance paid from federal funds, fiscal year 1967 (125).
- VI. Assistance provided (including whether or not there are maximums, and if so, of what kind, as well as exceptions •• to such maximums). National Center for

^{*} Unless otherwise designated numbers in parentheses refer to pages of the Appendix herein.

^{**} The Department of HEW does not list special needs provided by states which do not have maximum payments. They appear to be relevant only as exceptions by which maximums may more closely approximate the standard of need.

Social Statistics Report D-3 (October, 1968, HEW Social and Rehabilitation Service).

VII. Number of AFDC recipients ("Public Assistance Statistics", National Center for Social Statistics Report A-2 [June, 1969, HEW Social and Rehabilitation Service]).

VIII. Proportion of population receiving AFDC (children aided per thousand population under age 18 as of June, 1968) (118).

1. New York

I. \$71.75 monthly per recipient.

II. \$32.45 for AFDC per inhabitant.

III. \$278 per month needed for a family of four.

IV. \$278 paid to a family of four per month.

V. 39.9% Federal assistance.

VI, No maximum.

VII. 1,005,000 AFDC recipients.

VIII. 105 recipients per thousand children.

2. New Jersey

I. \$58.25 monthly per recipient.

II. \$13.70 for AFDC per inhabitant.

III. \$332 per month needed for a family of four.

IV. \$332 paid to a family of four per month.

V. 41.4% Federal assistance.

VI. No maximum.

VII. 221,000 AFDC recipients.

VIII. 51 recipients per thousand children.

3. Massachusetts

I. \$55.85 monthly per recipient.

II. \$16.85 for AFDC per inhabitant.

III. \$288 per month needed for a family of four.

IV. \$288 paid to a family of four per month.

V. 48.0% Federal assistance.

VI. No maximum.

VII. 181,000 AFDC recipients.

VIII. 60 recipients per thousand children.

4. Minnesota

I. \$54.00 monthly per recipient.

II. \$10.40 for AFDC per inhabitant.

III. \$266 per month needed for a family of four.

IV. \$266 paid to a family of four per month.

V. 54.7% Federal assistance.

VI. No maximum.

VII. 66,100 AFDC recipients.

VIII. 33 recipients per thousand children.

5. Connecticut

I. \$52.00 monthly per recipient.

II. \$14.40 for AFDC per inhabitant.

III. \$307 per month needed for a family of four.

IV. \$307 paid to a family of four per month.

V. 45.3% Federal assistance.

VI. No maximum.

VII. 78,300 AFDC recipients.

VIII. 48 recipients per thousand children.

6. Wisconsin

I. \$50.30 monthly per recipient.

II. \$7.55 for AFDC per inhabitant.

III. \$239 per month needed for a family of four.

IV. \$239 paid to a family of four per month.

V. 56.1% Federal assistance.

VI. No maximum.

VII. 82,600 AFDC recipients.

VIII. 34 recipients per thousand children.

7. Iowa

I. \$49.25 monthly per recipient.

II. \$10.05 for AFDC per inhabitant.

III. \$256 per month needed for a family of four.

IV. \$244 paid to a family of four per month.

V. 53.3% Federal assistance.

VI. No maximum.

VII. 115,000 AFDC recipients.

VIII. 40 recipients per thousand children.

8. North Dakota

I. \$47.90 monthly per recipient.

II. \$8.45 for AFDC per inhabitant.

III. \$251 per month needed for a family of four.

IV. \$251 paid to a family of four per month.

V. 65.2% Federal assistance.

VI. No maximum.

VII. 10,100 AFDC recipients.

VIII. 37 recipients per thousand children.

9. Rhode Island

I. \$47.80 monthly per-recipient.

II. \$16.55 for AFDC per inhabitant.

III. \$266 per month needed for a family of four.

IV. \$266 paid to a family of four per month.

V. 52.8% Federal assistance.

VI. No maximum.

VII. 35,300 AFDC recipients.

VIII. 76 recipients per thousand children.

10. Washington

I. \$47.65 monthly per recipient.

II. \$11.55 for AFDC per inhabitant.

III. \$268 per month needed for a family of four.

IV. \$268 paid to a family of four per month.

V. 50.9% Federal assistance.

VI. Family maximum of \$325, except to prevent undue hardship.

VII. 79,700 AFDC recipients.

VIII. 42 recipients per thousand children.

11. Vermont

I. \$46.75 monthly per recipient.

II. \$10.45 for AFDC per inhabitant.

III. \$249 per month needed for a family of four.

IV. \$249 paid to a family of four per month.

V. 69.7% Federal assistance.

VI. No Maximum.

VII. 11,500 AFDC recipients.

VIII. 44 recipients per thousand children.

12. Idaho

I. \$46.75 monthly per recipient.

II. \$9.40 for AFDC per inhabitant.

III. \$238 per month needed for a family of four.

IV. \$238 paid to a family of four per month.

V. 70.7% Federal assistance.

VI. No maximum.

VII. 13,000 AFDC recipients.

VIII. 33 recipients per thousand children.

13. California

I. \$45.55 monthly per recipient.

II. \$22.00 for AFDC per inhabitant.

III. \$244 per month for a family of four.

IV. \$183 paid to a family of four per month.

V. 48.6% Federal assistance.

VI. With 2 adults and 1 child a maximum of \$166; for 2 children \$191 and varying increases up to \$437 for 14 children and \$6 for each additional child. With 1 or no adults the maximum range is from \$148 for 1 child to \$221 for 3 children with varying increases to \$412 for 13 children and \$6 for each additional child. This maximum may be exceeded for special needs paid from local funds.

VII. 1,004,000 AFDC recipients.

VIII. 88 recipients per thousand children.

14. Michigan

I. \$45.15 monthly per recipient.

II. \$11.00 for AFDC per inhabitant.

III. \$246 per month needed for a family of four.

IV. \$246 paid to a family of four per month.

V. 48.9% Federal assistance.

VI. No maximum.

VII. 217,000 AFDC recipients.

VIII. 45 recipients per thousand children.

15. South Dakota

I. \$44.45 monthly per recipient.

II. \$10.30 for AFDC per inhabitant.

III. \$254 per month needed for a family of four.

IV, \$229 paid to a family of four per month.

V. 62.5% Federal assistance.

VI. Payment plus income may not represent more than 95% of standard of assistance.

VII. 15,000 AFDC recipients.

VIII. 42 recipients per thousand children.

16. Hawaii

I. \$44.40 monthly per recipient.

II. \$13.30 for AFDC per inhabitant.

III. \$225 per month needed for a family of four.

IV. \$225 paid to a family of four per month.

V. 47.8% Federal assistance.

VI. No maximum.

VII. 21,400 AFDC recipients.

VIII. 48 recipients per thousand children.

17. Kansas

I. \$44.00 monthly per recipient.

II. \$9.05 for AFDC per inhabitant.

III. \$237 per month needed for a family of four.

IV. \$237 paid to a family of four per month.

18. Illinois

I. \$43.95 monthly per recipient.

II. \$13.10 for AFDC per inhabitant.

III. \$279 per month needed for a family of four.

IV. \$279 paid to a family of four per month.

V. 49.1% Federal assistance.

VI. No maximum.

VII. 337,000 AFDC recipients.

VIII. 60 recipients per thousand children.

New Hampshire 19.

I. \$43.35 monthly per recipient.

II. \$4.05 for AFDC per inhabitant.

III. \$254 per month needed for a family of four.

IV. \$254 paid to a family of four per month.

V. 43.7% Federal assistance.

VI. No maximum.

VII. 7,700 AFDC recipients.

VIII. 19 recipients per thousand children.

20. United States Average

I. \$41.85 monthly per recipient.II. \$12.40 for AFDC per inhabitant.

III. No average computed but \$278 was the nonfarm poverty level in 1966.

IV. No average computed.

V. 54.6% Federal assistance.

VI. As of October 1968, out of the 54 districts, 31 paid less than the full standard of assistance. Of these. 19 districts had family maximums, 7 had maximums per recipient but no family maximums, 4 had maximums depending on the number of persons in an assistance unit, 4 had limits on the percentage of the standard of need represented by the grant plus income and 7 had limits on the percentage of budget deficit represented by the grants.

VII. 6,558,000 total AFDC recipients, in United States. VIII. 58 recipients per thousand children.

21. Oregon

I. \$40.25 monthly per recipient.

II. \$9.75 for AFDC per inhabitant.

III. \$226 per month needed for a family of four.

IV. \$226 paid to a family of four per month.

V. 51.5% Federal assistance.

VI. No maximum.

VII. 52,000 AFDC recipients.

VIII. 42 recipients per thousand children.

22. Colorado

I, \$39.75 monthly per recipient.

II. \$11.80 for AFDC per inhabitant.

III. \$222 per month needed for a family of four.

IV. \$185 paid to a family of four per month.

V. 53.0% Federal assistance.

VI. With two adults a maximum of \$90 for 1 child plus \$26 for each additional child up to 4 children. With 1 adult a maximum of \$60 for 1 child plus \$26 for each additional child up to 5 children, and without an adult \$26 for each child up to 5 children and \$21 for each further additional child in any event. Shelter and utilities are subject to separate maximums which vary among 3 geographical zones of the State. Furthermore, the payment plus income may not represent more than 75% of the standard of need.

VII. 57,200 AFDC recipients.

VIII. 56 recipients per thousand children.

23. Maryland

I. \$39.00 monthly per recipient.

II. \$13.25 per AFDC per inhabitant.

III. \$178 per month needed for a family of four.

IV. \$178 paid to a family of four per month.

V. 49.4% Federal assistance.

VI. Family maximum of \$250 in Baltimore and \$240 in the rest of the State. However, the maximum may be exceeded by emergency grants, demonstration projects in Baltimore and rent supplements from local funds in Montgomery County.

VII. 118,000 AFDC recipients.

VIII. 62 recipients per thousand children.

24. District of Columbia

I. \$38.90 monthly per recipient.

II. \$14.45 for AFDC per inhabitant.

III. \$184 per month needed for a family of four.

IV. \$184 paid to a family of four per month.

V. 100% (all money for Capitol from Federal Treasury).

VI. No maximum.

VII. 33,000 AFDC recipients.

VIII. 75 recipients per thousand children.

25. Pennsylvania

I. \$38.55 monthly per recipient.

II. \$11.45 for AFDC per inhabitant.

III. \$213 per month needed for a family of four.

IV. \$213 paid to a family of four per month.

V. 51.8% Federal assistance.

VI. No maximum.

VII. 376,000 AFDC recipients.

VIII. 58 recipients per thousand children.

26. Utah

I. \$38.25 monthly per recipient.

II. \$11.45 for AFDC per inhabitant.

III. \$185 per month needed for a family of four.

IV. \$185 paid to a family of four per month.

V. 66.2% Federal assistance.

VI. Maximum depending on number of persons in the assistance unit from 1 to 14 as follows: \$86, \$138, \$163, \$185, \$205, \$226, \$246, \$260, \$274, \$288, \$302, \$316, \$330, \$344. These maximums may be exceeded for special needs.

VII. 29,700 AFDC recipients.

VIII. 45 recipients per thousand children.

27. Alaska

I. \$38.10 monthly per recipient. II. \$7.85 for AFDC per inhabitant.

III. \$419 per month needed for a family of four.

IV. \$185 paid to a family of four per month.

V. 47.7% Federal assistance.

VI. Maximum of \$105 for first child if there is an adult recipient. If not, a maximum of \$50 plus \$40 for each additional child. This amount may be exceeded for costs of an approved training course.

VII. 7,000 AFDC recipients.

VIII. 38 recipients per thousand children.

28. Wyoming

I. \$38.05 monthly per recipient.

II. \$6.40 for AFDC per inhabitant.

III. \$278 per month needed for a family of four. IV. \$200 paid to a family of four per month.

V. 51.2% Federal assistance.

VI. Maximum of \$100 for 1 recipient; \$170 for 2; \$200 for 3 or 4; \$215 for 5, 6 or 7; and a family maximum of \$230.

VII. 1,500 AFDC recipients.

VIII. 30 recipients per thousand children.

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29. Ohio

I. \$37.50 monthly per recipient. II. \$8.70 for AFDC per inhabitant.

III. \$193 per month needed for a family of four.

IV. \$193 paid to a family of four per month.

V. 49.6% Federal assistance.

VI. No maximum.

VII. 248,000 AFDC recipients.

VIII. 45 recipients per thousand children.

Montana 30.

I. \$36.95 monthly per recipient.

II. \$6.25 for AFDC per inhabitant.

III. \$224 per month needed for a family of four.

IV. \$224 paid to a family of four per month.

V. 46.7% Federal assistance.

VI. No maximum.

VII. 11,400 AFDC recipients.

VIII. 29 recipients per thousand children.

Nebraska 31.

I. \$35.85 monthly per recipient.

II. \$7.20 for AFDC per inhabitant.

III. \$330 per month needed for a family of four.

IV. \$200 paid to a family of four per month.

V. 67.8% Federal assistance.

VI. Maximum of \$110 for the first child, \$140 for the second, \$170 for the third plus \$10 for each additional child.

VII. 26,500 AFDC recipients.

VIII. 37 recipients per thousand children.

32. Guam

I. \$35.00 monthly per recipient.

II. \$3.75 for AFDC per inhabitant.

III. \$256 per month needed for a family of four.

IV. \$256 paid to a family of four per month.

V. 50%. Moreover there is a limit on total amount of federal funds expended on public assistance, excluding medical assistance (NCSS Report D-3, p. 3 [10/ 68]).

VI. No maximum.

VII. 1,500 AFDC recipients.

VIII. 23 recipients per thousand children.

33. Oklahoma

I. \$34.40 monthly per recipient.

II. \$14.90 for AFDC per inhabitant.

III. \$175 per month needed for a family of four.

IV. \$175 paid to a family of four per month.

V. 70.0% Federal assistance.

VI. Maximum depending on the number of persons in an assistance unit from 1 to 9 as follows: \$35, \$120, \$150, \$175, \$200, \$220, \$239, \$255, \$277, with a family maximum of \$277.

VII. 88,800 AFDC recipients.

VIII. 79 recipients per thousand children.

34. Indiana

I. \$32.65 monthly per recipient.

II. \$3.90 for AFDC per inhabitant.

III. \$287 per month needed for a family of four.

IV. \$150 paid to a family of four per month.

V. 59.0% Federal assistance.

VI. Maximum of \$100 for 1 adult and 1 child and \$50 for a child alone plus \$25 for each additional child. If the adult is incapacitated, the maximum is increased by \$25. The maximum may be exceeded for costs of medical care.

VII. 60,100 AFDC recipients.

VIII. 22 recipients per thousand children.

35. Delaware

I. \$32.25 monthly per recipient.

II. \$12.10 for AFDC per inhabitant.

III. \$236 per month needed for a family of four.

IV. \$187 paid to a family of four per month.

V. 59.7% Federal assistance.

VI. Maximum of \$50 per adult, \$75 for the first child, \$12 for each additional child up to 4, \$10 for each additional child up to 7 and \$9 for each additional child to a family maximum of \$250 if there is an adult and \$150 where there is no adult.

VII. 18,100 AFDC recipients.

VIII. 65 recipients per thousand children.

36. Virginia

I. \$30.90 monthly per recipient.

II. \$4.55 for AFDC per inhabitant.

III. \$195 per month needed for a family of four.

IV. \$191 paid to a family of four per month.

V. 70.2% Federal assistance.

VI. Family maximum of \$225 which may be exceeded for costs of medical care and guardianship and for costs of special needs from local funds. Furthermore, the assistance payment and any other income may not exceed 90% of the standard of assistance, but that reduction is only applicable to requirements for food, clothing, personal care, household supplies, school supplies, and insurance.

VII. 71,100 AFDC recipients.

VIII. 28 recipients per thousand chilldren.

37. Nevada

I. \$30.90 monthly per recipient.

II. \$6.20 for AFDC per inhabitant.

III. \$300 per month needed for a family of four.

IV. \$158 paid to a family of four per month.

V. 56.3% Federal assistance.

VI. Maximum of \$31 per individual recipient. This maximum may be exceeded up to 20% of unmet need.

VII. 9,400 AFDC recipients.

VIII. 38 recipients per thousand children.

38. New Mexico

I. \$30.85 monthly per recipient.

II. \$14.05 for AFDC per inhabitant.

III. \$193 per month needed for a family of four.

IV. \$183 paid to a family of four per month.

V. 73.1% Federal assistance.

VI. Family maximum of \$190. Furthermore, the assistance payment may not represent more than 95% of unmet need.

VII, 44,800 AFDC recipients.

VIII. 72 recipients per thousand children.

39. Maine

I. \$29.70 monthly per recipient.

II. \$7.90 for AFDC per inhabitant.

III. \$251 per month needed for a family of four.

IV. \$137 paid to a family of four per month.

V. 67.3% Federal assistance.

VI. Maximum of \$40 per adult (the second adult must be a parent), \$40 for the first child, \$30 for the second and \$27 for each additional child to a family maximum of \$250. If there are 2 adults in the family, a maximum of \$30 for the first child and \$27 for each additional child to a family maximum of \$250. Furthermore, the assistance payment plus income may not exceed \$300 per family.

VII. 29,300 AFDC recipients.

VIII. 47 recipients per thousand children.

40. Arizona

- I. \$28.85 monthly per recipient.
- II. \$8.90 for AFDC per inhabitant.
- III. \$202 per month needed for a family of four.
- IV. \$134 paid to a family of four per month.
 - V. 73.5% Federal assistance.
- VI. Maximum of \$80 for the first child and \$27 for each additional child up to a maximum of \$220 for a family of 3 or more and \$155 for a family of 2.
- VII. 45,400 AFDC recipients.
- VIII. 31 recipients per thousand children.

41. Virgin Islands

- I. \$28.75 monthly per recipient.
- II. \$8.80 for AFDC per inhabitant.
- III. \$136 per month needed for a family of four.
- IV. \$136 paid to a family of four per manth.
 - V. 50% Federal assistance. Furthermore, there is a limitation on the amount of total federal assistance exclusive of medical assistance. (NCSS Report D-3, p. 3 [10/68]).
- VI. No maximum.
- VII. 1,700 AFDC recipients.
- VIII. 49 recipients per thousand children.

42. Kentucky

- I. \$28.50 monthly per recipient.
- II. \$11.10 for AFDC per inhabitant.
- III. \$216 per month needed for a family of four.
- IV. \$187 paid to a family of four per month.
 - V. 77.5% Federal assistance.
- VI. In "industrial counties" for a family of less than 7 a maximum of \$220 and for more than 7, \$260. In all other counties for a family of less than 7 a maximum of \$180 and for more than 7, \$220. Furthermore, this assistance payment may not represent more than 86.5% of the budget deficit.

VII. 123,000 AFDC recipients.

VIII. 69 recipients per thousand children.

43. Tennessee

I. \$26.45 monthly per recipient.

II. \$7.65 for AFDC per inhabitant.

III. \$206 per month needed for a family of four.

IV. \$114 paid to a family of four per month.

V. 74.1% Federal assistance.

VI. A maximum of \$45 for an adult, \$45 for the first child and \$15 for each additional child up to a family maximum of \$150 with an adult and \$135 without an adult.

VII. 71,400 AFDC recipients.

VIII. 56 recipients per thousand children.

44. North Carolina

I. \$25.85 monthly per recipient.

II. \$6.30 for AFDC per inhabitant.

III. \$144 per month needed for a family of four.

IV. \$144 paid to a family of four per month.

V. 73.1% Federal assistance.

VI. No maximum.

VII. 115,000 AFDC recipients.

VIII. 44 recipients per thousand children.

45. West Virginia

I. \$25.60 monthly per recipient.

II. \$15.95 for AFDC per inhabitant.

III. \$248 per month needed for a family of four.

IV. \$161 paid to a family of four per month.

V. 76.1% Federal assistance.

VI. A family maximum of \$165 except payments may exceed that maximum for transportation, clothing for work, laundry and special diet. Furthermore, the assistance payment plus other income may not represent more than 65.0% of the standard of need (except that this limitation does not apply to child care, transportation, clothing for work, laundry and special diet).

VII. 83,200 AFDC recipients.

VIII. 102 recipients per thousand children.

46. Georgia

I. \$24.90 monthly per recipient.

II. \$6.90 for AFDC per inhabitant.

III. \$198 per month needed for a family of four.

IV. \$125 paid to a family of four per month.

V. 78.4% Federal assistance.

VI. A maximum of \$29 per adult, \$38 for the first child and \$29 for each additional child up to a family maximum of \$154.

VII. 161,000 AFDC recipients.

VIII. 52 recipients per thousand children.

47. Missouri

I. \$24.65 monthly per recipient.

II. \$7.30 for AFDC per inhabitant.

III. \$305 per month needed for a family of four.

IV. \$124 paid to a family of four per month.

V. 65.4% Federal assistance.

VI. A maximum of \$33 per adult, \$43 for the first child and \$24 for each additional child.

VII. 124,000 AFDC recipients.

VIII. 37 recipients per thousand children.

48. Louisiana

I. \$23.65 monthly per recipient.

II. \$9.75 for AFDC per inhabitant.

III. \$204 per month needed for a family of four.

IV. \$116 paid to a family of four per month.

V. 74.7% Federal assistance.

VI. \$80 for the first child (whether or not there is an adult), \$19 for the second child, \$17 each for the third and fourth child, \$12 for the fifth child and \$18 for each additional child up to a family maximum of \$163. A second adult is counted as a child. These maximums may be exceeded for medical and dietetic special needs up to a maximum of \$168. Furthermore, there is a special medical allowance for an ill or handicapped child up to \$263.

VII. 178,000 AFDC recipients.

VIII. 74 recipients per thousand children.

49. Texas

I. \$20.45 monthly per recipient.

II. \$2.85 for AFDC per inhabitant.

III. \$206 per month needed for a family of four.

IV. \$114 paid to a family of four per month.

V. 74.1% Federal assistance.

VI. A maximum of \$60 for an adult and one child or \$34 for a child alone and \$21 for each additional child up to a family maximum of \$123 with an adult or \$118 without an adult.

VII. 166,000 AFDC recipients.

VIII. 26 recipients per thousand children.

50. Arkansas

I. \$19.25 monthly per recipient.

II. \$4.45 for AFDC per inhabitant.

III. \$162 per month needed for a family of four.

IV. \$90 paid to a family of four per month.

V. 77.0% Federal assistance.

VI. A maximum of \$5 for each adult, \$60 for the first child and \$10 for each additional child up to a family maximum of \$130 if there are adults in the family and \$120 without an adult.

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VII. 40,700 AFDC recipients.

VIII. 41 recipients per thousand children.

51. South Carolina

L \$18.45 monthly per recipient.

II, \$2.25 for AFDC per inhabitant.

III. \$172 per month needed for a family of four.

IV. \$93 paid to a family of four per month.

V. 78.1% Federal assistance.

VI. A maximum of \$15 for each adult, \$30 for the first child and \$21 for each additional child up to a family maximum of \$125.

VII. 42,200 AFDC recipients.

VIII. 24 recipients per thousand children.

52. Puerto Rico

I. \$16.10 monthly per recipient.

II. \$4.80 for AFDC per inhabitant.

III. \$70 per month needed for a family of four.

IV. \$28 paid to a family of four per month.

V. 50% Federal assistance. Moreover, there is a limitation on the total amount of Federal funds that can be paid annually for public assistance, excluding medical assistance. (NCSS Report D-3, p. 3 [10/1968]).

VI. The assistance payment may not represent more than 33.0% of the budget deficit.

VII. 197,000 AFDC recipients.

VIII. 104 recipients per thousand children.

53. Florida

I. \$15.15 monthly per recipient.

II. \$4.35 for AFDC per inhabitant.

III. \$189 per month needed for a family of four.

IV. \$85 paid to a family of four per month.

V. 76.6% Federal assistance.

VI. The assistance payment may not represent more than 65.0% of the budget deficit.

VII. 178,000 AFDC recipients.

VIII. 37 recipients per thousand children.

54. Alabama

- I. \$15.15 monthly per recipient.
- II. \$3.95 for AFDC per inhabitant.
- III. \$177 per month needed for a family of four.
- IV. \$89 paid to a family of four per month.
 - V. 77.6% Federal assistance.
- VI. Maximum of \$40 for the first child and \$25 for each additional child up to a family maximum of \$140. Furthermore, the assistance payment may not represent more than 50% of the budget deficit except that this percentage limitation does not apply in cases of exceptional need.
- VII. 105,000 AFDC recipients.
- VIII. 33 recipients per thousand children.

55. Mississippi

- I. \$8.50 monthly per recipient.
- II. \$4.35 for AFDC per inhabitant.
 - III. \$201.00 per month needed for a family of four.
 - IV. \$55.00 paid to a family of four per month.
 - V. 81.3% Federal assistance.
- VI. A maximum of \$25 for the first child, \$15 for the second child and \$10 for each additional child up to a family maximum of \$90. Moreover, the assistance payment may not represent more than 27.0% of the budget deficit except this percentage limitation does not apply for care at boarding schools and special educational institutions.
- VII. 106,000 AFDC recipients.
- VIII. 92 recipients per thousand children.

FILE COP'I

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JOHN F. DAVIS, &

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

Julia Rosardo et. al.

Petitioners

V.

George K. Wyman et. al.

Respondents

MOTION OF STATE OF INDIANA FOR LEAVE TO. FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Theodore L. Sendak Attorney General of Indiana Robert A. Zaban Deputy Attorney General

219 State House Indianapolis, Indiana 46204 Tel. No. (317) 633-5512

IN THE

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The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Robert A. Zaban, Deputy Attorney General, hereby respectfully moves for leave to file the attached brief amicus curiae in this case. Consent of the parties to this case is not required by virtue of Rule 42, Paragraph 4, of this Court.

The interest of the State of Indiana in this case arises from the fact that it is a party to a case presently pending in the United States District Court, Northern District of Indiana, Fort Wayne Division, in which one of the issues is identical and before both courts, namely the interpretation of 42 U.S.C. § 602(a)(23) with respect to states

participating in the AFDC program. Wynn v. Indiana State Department of Public Welfare et. al., Civil Action File No. 69 F 76.

It is believed the brief which amicus curiae is requesting to file will contain a more complete argument concerning constitutional and other considerations in construing 42 U.S.C. § 602(a)(23) in light of the financial realities of Federal-State participation as affected by 42 U.S.C. § 603(a)(1).

Respectfully submitted,
Theodobe L. Sendak
Attorney General of Indiana
Robert A. Zaban
Deputy Attorney General

219 State House Indianapolis, Indiana 46204 Tel. No. (317) 633-5512

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 1969, copies of this motion and brief were sent from Indianapolis, Indiana, via United States Mail, Air Mail, postage prepaid at Indianapolis, Indiana, to the following persons:

- Miss Amy Juviler
 Assistant Attorney General of New York
 80 Centre Street, New York, New York 10013
 (Attorney for Respondent)
- Mr. Lee A. Albert Columbia Center
 401 West 117th Street New York, New York 10027 (Attorney for Petitioners)

- 3. The Solicitor General Department of Justice Washington, D. C. 20530
- 4. The Secretary of Health, Education and Welfare Department of Health, Education and Welfare Washington, D. C.

I further certify that all parties required to be served have been served.

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT A. ZABAN

Deputy Attorney General

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

SUMMARY OF ARGUMENT

The purpose of the AFDC provisions of the Social Security Act is to provide the AFDC category of public welfare recipients with benefits through a statutory scheme by which federal and state funds are matched in certain proportions and by which the federal and state governments participate financially. Any amendment to the AFDC provisions of the Social Security Act which is deemed to increase benefits without federal financial participation is an infringement upon the police powers of the states and an attempt to preempt the states in matters relating to public welfare. Congress did not have these intentions when it enacted the clause which is now 42 U.S.C. § 602(a)(23). Therefore, Congress intended that this clause only apply to those states whose AFDC benefits are below the federal participation maximum as found in 42 U.S.C. § 602(a)(23).

ARGUMENT

Under the Tenth Amendment of the Constitution of the United States "All powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people."

Public Welfare is within the police powers of a state as conferred by the Tenth Amendment. The states as sovereigns have power to contract with other sovereigns as long as the incidents of their sovereignty are not waived. By virtue of the Social Security Act of 1935 and the corresponding legislation of each state, the states and the Federal government can enter into agreements whereby the states can receive federal funds for Aid And Services To Fami-

lies With Dependent Children, hereafter termed AFDC. on a matching fund or participation basis. The matching fund formula is found in 42 U.S.C. § 603(a)(1). Of the average monthly benefit payment per recipient, the Federal government will pay \$15 of the first \$18 plus half of the difference between \$18 and \$32. The federal government will neither participate nor match funds to the extent that average monthly benefits per recipient exceed \$32. In other words all benefits above \$32 per month per recipient are out of the ambit of state-federal matching fund participation and are, therefore, out of the realm of the AFDC provision of the Social Security Act of which 42 U.S.C. § 602(a)(23) is a recent amendment. There is nothing in the AFDC provision of the Social Security Act of 1935 as amended or in any part of the act by which it is intended that Congress preempt the states in public welfare matters. This is certainly logical since the Tenth Amendment precludes such preemption.

It is hereby submitted that any attempt by Congress to coerce the states to provide welfare payments beyond the amounts by which the federal government will participate is certainly not only outside of the ambit of the Social Security Act as amended but also an infringement upon state sovereignty contrary to the Tenth Amendment and an attempt to preempt the states in public welfare matters. It must also be pointed out that the \$32 per recipient per month maximum participation level, amounting to \$22 per recipient per month in actual federal funds received via the formula in 42 U.S.C. § 603(a)(1), has not changed since 1958, i.e., for eleven years.

It may be argued that if the states do not like the present state-federal financial arrangement, they can drop out of the plan, and then they would not be plagued by such undesirable terms. This is true, but the welfare re-

cipients around this nation will derive little benefit from such action.

42 U.S.C. § 602(a)(23) can be interpreted in such a way as to be not only inequitable but also as to raise some serious constitutional questions. However, the State of Indiana does not necessarily challenge the constitutionality of 42 U.S.C. § 602(a)(23). Rather, it is asserted that if a law has two interpretations, one which renders it constitutional and one which renders it unconstitutional, the constitutional interpretation will prevail before this Court.

In order to give 42 U.S.C. § 602(a)(23) a constitutional interpretation it must apply only to states whose AFDC benefits are below the maximum amounts per recipient per month by which the Federal government will participate in the state-federal plan. It is not only the most constitutional and rational interpretation, but it is also the most equitable interpretation.

It is further asserted that if 42 U.S.C. § 602(a)(23) were meant to have the broad, sweeping effect which would make it applicable to all states sharing AFDC revenues then the maximum participation amounts under 42 U.S.C. § 603(a) (1) would also have been raised so that this clause would be in conformity with the federal participation purposes of the AFDC provision, especially since such maximums have not been raised in eleven years as heretofore pointed out.

By some very recent decisions by this Court in two AFDC cases which are widely cited as authority for the rights of AFDC recipients or those allegedly entitled thereof, King v. Smith, 392 U.S. 309, 83 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968), and Sharpiro v. Thompson, - U.S. -, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), this Court has specifically recognized that states may legitimately control welfare benefit payments. These cases, although decided before July 1, 1969, when 42 U.S.C. § 602(a)(23) went into effect, were nevertheless decided after January 2, 1968, when the President signed the bill containing the amendment now known as 42 U.S.C. § 602(a)(23). Therefore, this clause could not have the broad, sweeping effect as contended by some nor could it be deemed to be applicable to all participating states.

Another clue shedding light upon which states 42 U.S.C. \$602(a)(23) has application can be seen in President Nixon's proposed welfare overhaul to assure a minimus \$1,600 for a family of four. This amounts to \$25 per ient per month. The first year extra welfare cost is entered to be \$4.4 billion. Presently there are House hearings under way on the bill with this provision. If such a bill is needed to overhaul our welfare system, and if its extra cost is so great, it would seem that 42 U.S.C. \$602(a)(23) was intended for states whose AFDC payments do not insure a family of four recipients a minimum income of \$1,600 per year.

It must be brought to the attention of the Court that in the year ending June 30, 1969, the State of Indiana experienced an increase of 25 per cent in the number of AFDC recipients. With the state's tax base already depleted by federal taxes and the taxes necessary for state and local government to survive, it would be a burden of major proportions for the states to increase their welfare burden even more by complying with the proposed broad, sweeping interpretation of 42 U.S.C. § 602(a)(23) which some ascribe to it, unless the limits of federal funds participation as found in 42 U.S.C. § 603(a)(1) are substantially raised. It is difficult to believe that Congress meant to put some of the states in such difficult financial straights by ascribing a broad, sweeping affect to 42 U.S.C. § 602(a)(23).

It is further submitted that if 42 U.S.C. § 602(a)(23) were intended to apply to all states which share in federal AFDC funds, it is rather difficult to believe that it would

have been enacted as a mere clause in a very complex, multifaceted Act, especially when its enactment raises the conflicts, questions, and issues brought forth in this brief and in all the pleadings, briefs, and judicial decisions in conflict with each other from the beginning of the litigation in this matter up to the present time.

CONCLUSION

The clause as found in 42 U.S.C. § 602(a)(23) was intended to apply only to those states in which the average monthly AFDC benefit payment per recipient is \$32 or less.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

ROBERT A. ZABAN
Deputy Attorney General

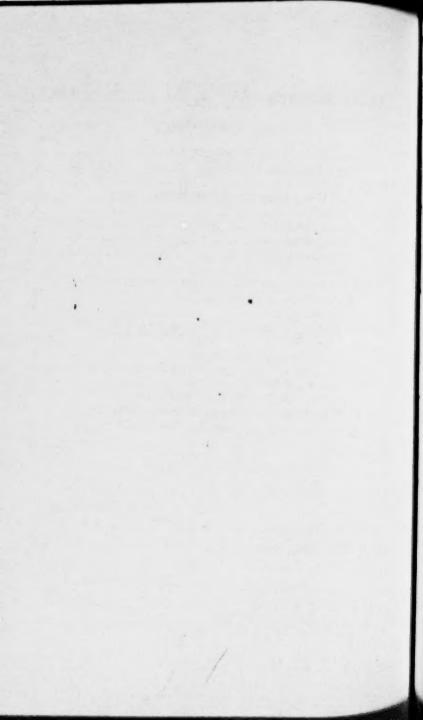
219 State House Indianapolis, Indiana 46204

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 540

JULIA ROSADO, ET AL., PETITIONERS

v.

GEORGE K. WYMAN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Because its interpretation of 42 U.S.C. (Supp. IV) 602(a)(23) has been put in issue by the petitioners in this case, the United States submits this brief statement of its views amicus curiae on that question. We do not discuss the jurisdictional issues in the case nor, save to show that it is an entirely distinct question, the issue whether the New York statute challenged in this case merely consolidates and streamlines that state's standards for determining need, an effect entirely consistent with 42 U.S.C. 602(a)(23), or results in an impermissible reduction in the content of that standard, as forbidden under regulations of the Department of Health, Education, and Welfare interpreting that section. 45 C.F.R. 233.20(a)(2)(ii), 34

Fed. Reg. 1392, 1394 (1969); App. A infra. Moreover, because the government's views on the meaning of 42 U.S.C. 602(a) (23) are set out in detail in its briefs amicus curiae in Lampton v. Bonin and Jefferson v. Hackney, reprinted in relevant part as an appendix to petitioners' brief in this Court, and in view of the very limited time available before submission of the case, we confine our remarks to a summary of that interpretation and responses to the contentions made, or anticipated to be made, by the parties in this case.

1. Under 42 U.S.C. 602(a)(23), in order to be eligible to receive federal matching funds a state plan for Aid to Families with Dependent Children (AFDC) must

provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

Petitioners would read this language to require an absolute increase in state benefit levels, reflecting cost-of-living changes, as a condition of states' continued receipt of federal matching funds. That is, they would make how much money state legislatures appropriate for welfare purposes the measure of participation in the federal program; if sufficient funds were not appropriated, the state plan would be out of compliance, and the Secretary of Health, Education, and Welfare would be obliged to disapprove the plan, rendering it ineligible for any further federal matching funds. 42

U.S.C. 602(b), 604. Such a condition would be unprecedented, and, in view of the continuing national and local concern over the cost of welfare, it would certainly have been the subject of intensive explanation and debate, had that been the job Congress meant Section 602(a) (23) to do. Despite petitioners' diligent efforts to disguise the fact, it is evident that no such discussion occurred. As shown at length in the reprinted district court amicus curiae brief, Pet. Br. A8—A10, A22—A28, Congress could hardly have paid less attention to the provision. Its attention to costs in other respects, ibid., makes clear that it would

The maintenance-of-effort provisions petitioners cite, 42 U.S.C. (Supp. III) 1317, are no precedent. They were enacted together with a general increase in federal funds, and in effect provided that the states would not receive any amount of the increase they used to decrease their own participation. S. Rep. No. 404, 89th Cong., 1st Sess. pp. 20, 151-152 (1965). Section 1317 was repealed, effective a year in advance of its original expiration date, by the same law as enacted 42 U.S.C. 602(a) (23). P.L. 90-248, Sec. 221(d), 81 Stat. 900.

As this Court has recognized in describing the Federal-State public assistance programs, King v. Smith, 392 U.S. 309, 318-319, "each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program"; the power to do so, at the time, was "undisputed." Id. at 334. While petitioners do dispute that power now, it is clear that, since the beginning, the programs have not sought to impose from the outside financial burdens that states could or would not bear; they were enacted for "the purpose * * * of enabling each State to furnish financial assistance * * * as far as practicable under the conditions in such State," 42 U.S.C. 601 (emphasis supplied), and the use of the matching formula made clear that it was the states, not the federal government, which would make the judgment as to what practicability allowed. See also H. Rep. No. 615, 74th Cong., 1st Sess., 4 (1935); S. Rep. No. 628, 74th Cong., 1st Sess., 4, 6, 19, 35 (1935).

not have neglected the provision if it had the effect petitioners propose.

2. New York, on the other hand, has argued that the provision lost effect on July 1, 1969, the day by which all states were by its terms to have increased their standards of need, and that the state, having complied, was therefore free as of that day to reduce the standard immediately however it chose. This reading, we believe, is equally untenable. As amply appears from its legislative history, 42 U.S.C. 602(a) (23) is the remainder of a provision which, as it passed the Senate, would have required yearly costof-living adjustments in the standard of need and applicable maximums. S. Rep. No. 744, 90th Cong., 1st Sess., 170 (1967). The provision for yearly adjustments was eliminated in conference, evidently as the product of compromise, to require the States to "make only one adjustment before July 1, 1969, after which date the provision would not apply." H. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 63 (1967). Thus, no further adjustments need be made. But this was a compromise, not a gutting of the bill. If states were free on or after July 1, 1969, to rescind the changes they had made, the provision would be meaningless. Accordingly, the Department's interpretation of the provision in this respect is that "States must maintain their adjusted standards after July 1, 1969, subject to the option of making further adjustments to reflect changes in living costs." App. A infra, p. 20.

3. The Department's reading of 42 U.S.C. 602(a) (23), in summary, is that it obliges states to adjust

"the amounts used * * * to determine the needs of individuals" and "any maximums that the State imposes on the amount of aid paid" to reflect fully changes in the cost of living since those amounts were determined, but that it does not oblige states to increase the amounts actually paid, in that states remain free to adopt a policy of paying a lower percentage of determined need than they previously had done."

The public assistance titles of the Social Security Act, and the regulations under those titles, require states to determine the needs of individuals seeking assistance on a statewide, objective, and equitable basis. 45 C.F.R. 233.20(a). While the federal agency, in urging states to use simplified methods of determining need, has made suggestions as to the items which should be considered in determining need, the states are free to decide, in a manner consistent with the regulations, what the needs of individuals eligible for assistance under the Act are. Importantly for this case, there is no requirement that the states pay eligible individuals the full amount of their needs thus determined; the amount of the assistance payment may be less, if that is determined by methods applied uniformly statewide. Ibid. The methods commonly used to set reduced payments take two forms: ratable reduc-

² 42 U.S.C. 602(a) (23) does not require adjustment of payments, merely adjustment of maximums on payments. Neither do the words require adjustment of, or otherwise deal with, ratable reductions. In a State using ratable reductions, a cost-of-living increase would be automatically passed on, absent any adjustment.

tion, in which a state determines that it will pay only a fixed percentage of actual need as determined by the state's need standard; and limitation to maximums, in which payments to individuals or families are made according to need but subject to a stated dollar maximum.³

Maximums, whether so many dollars per individual or a total number of dollars per family, have an arbitrary aspect lacking from ratable reductions, since their application means that one family or individual will receive a smaller proportion of the amounts he is determined to need under the state's test than another family or individual. Where percentage reductions are used, the payment of every family is reduced proportionately (although this, in turn, could work hardships unequally on small families, less able to spread expenses, if the reduction were substantial). While constitutional issues concerning maximums are not present here, compare Dandridge v. Williams, No. 131, this Term, this aspect explains why Congress might wish to distinguish between maximums and ratable reductions as a means of reducing a state's

³ Contrary to petitioners' contentions, the term "maximum" has consistently been used in the social welfare context to denote only the fixed upper limit imposed by a dollar maximum, and not the amounts calculated by use of a ratable reduction applicable in each case. Thus, the HEW Public Assistance Report No. 50, on "Characteristics of State Public Assistance Plans under the Social Security Act" lists for each state the "Maximum money payment to recipients," setting forth the applicable dollar maximums and omitting any mention of ratable reductions.

financial obligation and, at least inferentially, to disfavor the former. A decision not to allocate from a state's resources to its poor all they need can never be a comfortable one; making that decision in terms of a percentage formula, however, not only is probably more fair as among the various recipients of assistance, but also makes quite plain the character of the decision being made—and so quite possibly increases political pressures against it, and a willingness to forego other possible uses of state resources in order to avoid or reduce to a minimum the cuts made.

As already noted, 42 U.S.C. 602(a)(23) obliges states to adjust for cost-of-living changes the amounts used to determine need and the maximums if any imposed on the amount of aid paid; strikingly, it does not oblige the states to adjust the amounts actually paid, where these are less than the dollar maximums some states superimpose on payments. But the provision as initially proposed did embody such an obligation. Pet. Br. A-22 ff.; the omission can hardly be insignificant. Drawing upon that omission, and the general absence of the vigorous debate that could have been expected if the provision had been thought to require states to increase the amounts they pay, the Department interpreted the section to mean only what it says: states must adjust upwards the amounts used to determine need, and any fixed dollar maximums on payment; they remain free, however, to determine the extent of their financial commitment by adjusting

the percentage of actual need which they will pay. 45 C.F.R. 233.20(a)(2)(ii).

So interpreted, the provision is far from meaningless. As applied to dollar maximums, it alleviates the possibly arbitrary aspects of a fixed ceiling on payments irrespective of need. As applied to the determination of need, it assures that administrators, legislators and the public generally will be aware of what the poor actually require for their subsistence—discouraging the provision of less—and thus, at least, facilitates open-eyed allocation of the resources involved. Recalculation of need may serve to render eligible for benefits families which may appear under unadjusted standards marginally to have attained selfsufficiency, but which in fact are unable to subsist at the present cost of living. Families thus eligible would receive at least a small money payment, and

Of the fifty-four jurisdictions subject to the Act, only seventeen have both adjusted their need standards and raised payments proportionately (by paying 100 percent of need, by maintaining or reducing a percentage reduction, or by proportionately adjusting their dollar maximums). These are: Arkansas, Colorado, Georgia, Guam, Hawaii, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, and Washington. On the other hand, nineteen states either imposed a ratable reduction for the first time, or reduced below prior levels the proportion of need they pay: Alabama (formerly paid 50 percent of need; now pays 35 percent); Arizona (100%-69%); Iowa (95%-81%); Kansas (100%-89%); Kentucky (100%-82%); Louisiana (100%-51%); Maine (100%-60%); Mississippi (73%-70%); Montana (100%-88.6%); New Mexico (95%-90%); North Dakota (100%-93%); Ohio (77%-63.5%); Oklahoma (100%-85%); Oregon (100%-80%); South Carolina (100%-82%); Vermont (100%-80%); Virginia (100%-90%); West Virginia (63%-52%); and Wyoming (100%-72%).

would also be eligible for medical assistance and social and rehabilitative services. The likely result is, as has in fact been the case, that states will increase their public assistance payments. But such an increase is not made mandatory if the state is unable or unwilling to provide it; that is the crucial difference between the Department's interpretation and the interpretation petitioners propose. The Department's interpretation is, we believe, the more consistent with the words of the statute, the limited legislative history, and the respect Congress has consistently shown for the states' prerogative to determine the extent of the resources they can afford to commit to public assistance costs.

4. New York has not attempted a ratable reduction from actual need of the amounts it pays. It brought

⁵ As shown by the charts in Appendix B, between July 1968 and July 1969, the total number of AFDC recipients rose in every jurisdiction except West Virginia, and the total AFDC expenditures rose in every state but Wyoming. The average payment per recipient rose in 45 jurisdictions, remained the same in two, and declined in seven, with the most substantial decline occurring in Louisiana (\$23.70 to \$21.70), New York (\$71 to \$63.70) and Texas (\$20.45 to \$18.75). Nationally, the figures are:

rikalia series series i	July 1967	July 1968	July 1969
Number of AFDC recipients	4, 978, 000	5, 633, 000	6, 613, 000
Total payments for subsistence	\$185, 476, 000	\$237, 502, 000	\$293, 003, 000
Average payment per recipient	\$37, 25	\$42, 15	\$44, 30

The federal share varies by jurisdiction, ranging from 50 percent (in those which account for most of the expenditures) to 83 percent.

its need standard up to date in 1968, in compliance with 42 U.S.C. 602(a)(23), and pays the full amount of need as determined under its standard. Thus, whether 42 U.S.C. 602(a)(23) permits ratable reductions is not actually at issue in this case. Rather, the question is whether the alterations in the manner in which New York determines need under its amended statute are impermissible under the federal act.

This question arises because the Department has interpreted 42 U.S.C. 602(a) (23) to prohibit a state from altering its need standard by "a reduction in the content of the standard," 45 C.F.R. 233.20(a) (2) (ii), in such a way that the congressional purpose to secure a cost-of-living increase in the need standard is frustrated, and the function of making allocation decisions more rational and visible is no longer served. Petitioners allege that the New York changes have this forbidden effect.

An important consideration in determining this issue is the great need in many states to consolidate or streamline the standards for determining need. The complexity, both of present need standards and of present techniques for determining individual entitlements to assistance, has made welfare administra-

⁶ Although the federal agency sought additional information from New York bearing on the question whether the changes impermissibly reduce the content of the need standard, it is not now raising any question of compliance. In a letter of November 10, 1969, the Regional Commissioner of the Department's Social and Rehabilitation Service raised questions with the state regarding the disparity in payments between New York City and the rest of the state, but raised no questions regarding compliance with 42 U.S.C. 602(a) (23). (App. C. infra, pp. 28.)

tion unnecessarily burdensome, both to the states and to the persons it is intended to aid. Such streamlining is closely related to Departmental regulations regarding simplified methods for determining eligibility and the amount of assistance. 45 CFR 205.20, 34 Fed. Reg. 1144 (1969), 34 Fed. Reg. 17522 (1969). Simplification necessarily means less individualization. Conversion of a range of payments for a family of a given size to a single "average" payment will result in a smaller payment to some families. The Department does not view such administrative restructuring as contrary to 42 U.S.C. 602(a)(23) if it does not involve an overall reduction in the content of the need standard.

Moreover, special problems are presented with respect to the streamlining of so-called "special needs." Although petitioners allege that New York has treated as "special" needs that are in fact "basic" to most or all families on public assistance, usually the needs characterized as "special" are indeed extraordinary—the cost of an attendant, of a particular diet, and so forth. Streamlining the treatment of such needs is a matter of substantial complexity, which cannot be adequately resolved either by averaging over all the welfare recipients in the state the costs of such needs in the past or by holding that once a state has recognized special needs it is bound to assure that the

⁷ New York formerly recognized an atypically large number of special need items; on an experimental basis, New York City arranged to pay each AFDC recipient in the city \$25 per quarter, on a cyclical basis, in lieu of certain of these special need items.

persons receiving such payments will continue to do so. Taking these considerations into account, the Department has recently explained its "reduction of content" regulation, *supra*, as not applying to reductions in the recognition of special needs:

The updated revised or consolidated standard should be compatible in content and cost with the previous standards. As a minimum, the monetary amount of the consolidated standard must equal the total updated value of the former basic requirements. [App. A infra, pp. 16-17.] *

The national rule, applicable to all states, thus requires maintenance of the value of the basic requirements but, in view of the conceptual and practical problems of simplifying the treatment of special needs, it recommends, but does not require, maintenance of the value of the former total standards, inclusive of special needs.

Whether continued recognition must be given to such special need items, and, if so, in what amount, are indeed at issue in this case. We would only emphasize that the use of ratable reductions is not at issue. Nor should a decision on the content of the need standard go to the proposition that no family may suffer a reduction in payment as a result of consolidation of the standard, nor, in specific relation to spe-

^a The amount formerly recognized for a family of four in New York City for basic requirements, exclusive of shelter and fuel for heating, ranged from \$152 to \$221 per month, depending on the age of the oldest child. A family with the oldest child of an age equal to the average age of the oldest child in all four-member AFDC families received \$191 per month. The new schedule provides \$208 per month for a family of four.

cial need items, should New York's atypical situation be made to govern the rule applicable to all States.

Respectfully submitted.

ERWIN N. GRISWOLD,

Solicitor General.

WILLIAM D. RUCKELSHAUS,

Assistant Attorney General.

Peter L. Strauss, Assistant to the Solicitor General.

NOVEMBER 1969.

APPENDIX A

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,

Social and Rehabilitation Service, Washington, D.C., October 17, 1969.

SRS-APA-PS.

To: State agencies administering approved public assistance plans.

Subject: Updating State's Standard of Assistance in AFDC—Interpretation of Social Security Act Section 402(a)(23) and 45 CFR 233.20(a)(2) (ii)—See SRS Program Regulation 20-7, dated 1/29/69.

A number of questions have been raised by States regarding interpretation of regulations on updating AFDC standards. (See SRS Program Regulation 20-7, dated 1/29/69). The following has been prepared to help State agencies in meeting these important requirements.

Social Security Act Section 402(a) (23)

Provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

45 CFR § 233.20(a)(2)(ii)

In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to re-

flect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with paragraph (a)(3)(viii) of this section. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.

Interpretation

1. July 1, 1969:

"By July 1, 1969," means the required updating will have been completed and all AFDC assistance payments will have been recomputed in accordance with revised amounts, and, if applicable, adjusted maximums and ratable reductions.

2. Amounts:

(a) "Amounts" means the money amounts or standards of assistance as defined and determined by the State for all goods and services (basic and special circumstance requirements) included within the State's regulations or other policy issuance and which are used as the criteria to establish need and the amount of the assistance payment.

(b) The standards of assistance may be one all inclusive amount for the items included in the standard; it may be an amount for each group of items, or it

may be individual amounts for each item.

(c) Some States have consolidated their standard of assistance (i.e., have combined items) to simplify the determination of need. The updated revised or

consolidated standard should be compatible in content and cost with the previous standards. As a minimum, the monetary amount of the consolidated standard must equal the total updated value of the former basic requirements.

3. "Reflect fully changes in living costs since such amounts were established" means that the State agency must identify when the amounts to determine need were last priced. A cost study of the AFDC amounts should have been completed between January 2, 1968, and July 1, 1969, and the changes in living costs from the date the amounts were last priced should have been determined.

4. Acceptable cost study methods:

Method A.—In those situations where the State plans provide for specified periodic cost reviews of the AFDC assistance standard of living on a continuing basis, such programmed cost studies conducted during above time period are satisfactory.

Method B .-

(a) Using the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, for the appropriate region determine the current index price for the applicable items of living;

(b) calculate percentage change for the items in the index from the date the standard was last estab-

lished to the present date;

(c) apply the percentage change to each of the items or groups of items and determine dollar change;

(d) total the dollar cost of standard as reviewed;

(e) compare with existing standard to determine change.

Method C.—The State may conduct a statewide cost study of the items of living included in the amounts to determine need. Results of such studies are used as basis for determining amount of dollar costs for the items in AFDC assistance standards.

Method D.—State may contract for another agency to conduct statewide cost studies of items of living included in the AFDC standard of living and determine changes in cost of items in AFDC assistance standard.

Method E.—States may choose to revise content of existing standard of living and conduct cost studies of revised standards, U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 1570-5, may be used as a reference to re-establish a low-income level of living based on 1967 costs. A review of the content of items of living in the U.S. Department of Labor budget for the lower living standard for a 4-person urban family is suggested; the State selects the items of living consonant with conditions practicable in such State for a public assistance standard of living. Such standard must then be updated from Spring 1967 (date of U.S. Department of Labor, Bureau of Labor Statistics, 3 Levels of Living Standards) costs to current costs. Cost estimates for the 39 urban areas. described in the aforementioned publication, are available by writing to the appropriate Regional Offices of the Bureau of Labor Statistics. Agency may wish to use U.S. Department of Labor, Bureau of Labor Statistics Bulletin No. 1570-2 Revised Equivalence Scale for estimating costs of families by size, age, etc.

Method F.—For States who wished to revise existing public assistance standards but for whom the Bureau of Labor Statistics Urban Family of Four is not representative of the State's rural population as defined by the Bureau of the Census, a study of the U.S. Department of Labor and U.S. Department of Agriculture Consumption Study Data of 1960 and 1961 are suggested reference.

After selecting the recognizable items from such compiled data, costs for such items would need to be updated to current amounts to be used to determine need in AFDC.

Method G.—The above suggested methods of updating standards does not preclude the acceptability of a different method which is identifiable, equitable, and objective.

5. Will Have Been Adjusted:

- (a) "Will have been adjusted" means the amounts used by the State agency to determine need will have been corrected to reflect the changes in costs of living, since the amounts were last established. This adjustment in assistance standards must be made, even though other provisions regarding payment may offset it.
- (b) Adjusted amounts and costs study must bear a reasonable time relationship between cost study and the application into agency regulations. A cost study in early 1968, which was reflected in the agency's standard effective July 1, 1968, meets the requirements of the Act. However, if the agency did not adjust its standards until July 1, 1969, the cost study in early 1968 would not be acceptable; a more current study is needed.
- (c) In some instances, State agencies, during the period since standard was last established and July 1, 1969, have increased the money amounts (standards of living) from time to time, as a result of moneys becoming available from State or Federal legislation. These additional moneys, added to the standard of living, at irregular intervals should be calculated as an offset against the total change in living costs between date standard was last established and the date of updating.

6. "Any Maximums That the State Imposes on the Amount of Aid Paid to Families Will Have Been

Proportionately Adjusted."

This applies to dollar maximums. State maximums established for items of living (such as shelter costs) or overall for grants or payments, must be corrected to show the change in living costs since such maximums were established to the appropriate period between January 2, 1968, and July 1, 1969, as selected by the State agency.

7. The State agency may make a ratable reduction. It is recommended that the State agency implement

only one ratable reduction.

8. All AFDC assistance payments must be recomputed in accordance with the adjusted standards, and adjusted maximum and/or ratable reductions, when applicable. Implemented ratable reduction and adjusted maximums must be uniform statewide and objective.

9. States must maintain their adjusted standards after July 1, 1969, subject to the option of making further adjustments to reflect changes in living costs.

Sincerely,

JOHN J. HURLEY, Acting Commissioner.

APPENDIX B

Aid to families with dependent children: Recipients and payments to recipients, by State, July 1967

		**		Payme	Payments to recipients	lents		Percentage c	Percentage change from-	
	Normher of	Number of recipients	recipients		Average per-	e ber-	June 1967 in-	7 in-	July 1966 in-	-in-
Blate	families	Total :	Children	Total	Family	Recipient	Number of recipients	Amount	Number of	Amount
Total s	1, 212, 000	4, 978, 000	3, 745, 000	\$185, 476, 000	\$153.05	\$37.25	0	10.8	+11.4	
	17, 200	21 900	20 000						1.11.1	+21.
Alacka	1,300	5,000	9,900	902, 000	62, 85	12, 75	1	+.1	*	111
	10, 200	43,000	90 700	178,000	130, 25	34.85	90.	9	+4.0	121
A. Land	8,800	36,600	27, 800	1, 280, 000	120.55	28.70	9	(9)	+2.0	100
· · · · · · · · · · · · · · · · · · ·	190,000	789 000	888 000	000 000	80.98	19. 50	+.1	+	+15.9	7.87
Color	13, 700	53.400	40 800	3,000,000	175.65	44.00	-1.9	-1.9	+17.1	4101
Conn.	14,300	26,900	42 700	2, 256, 000	146.20	37.45	-1.0	90.1	+7.8	4.07
D. C.	3,400	14, 500	11 000	460,000	198, 95	48.55	+1.4	+2.8	+11.9	+19.6
电电光 人名埃德德 医皮肤	6, 200	24,300	10 800	014 000	134.95	31.75	+.6	1.1	+30.3	1360
7. M	36, 200	143,000	114 000	9 177 000	176.05	37.65	+.8	ε	+8.9	+22.2
	24, 200	96, 200	24 900	9 440 000	00.20	16, 26	+.6	+	+14.3	+18.7
Outside the second seco	160	850	300	4, 119, 000	101.00	25.45	+.6	+8.4	418.1	194
Hawaii s	4, 200	18 500	19 700	20,100	124.10	23, 76				100
Idaho, sa	3,000	11,300	8 300	888, 000	197.30	46.25	+2.4	+6.9	+21.7	+27.8
美食的现在分词形成的现在分词用用力不断倒发力的现在分词使用用用用用 的	54, 800	257,000	201 000	10 707 000	178, 70	46.70	1	+.8	+16.7	+37.7
其名称名的形形 电电影 医电影 电电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影	11,800	49,200	37 300	1 810 000	196.40	41.98	Θ	+1.2	+3.6	+7.0
LOWBERT	11,400	44, 800	32 800	1, 510, 000	128, 10	30, 70	1	+7.8	+	+17 K
电电流电影电影电影电影电影电影电影电影电影电影电影电影电影	8,900	37, 100	28 900	1, 362, 000	108.75	43.15	9	1.7	+1.1	+15.0
	25,000	98, 600	71. 600	2 764 000	110.00	43, 15	+2.2	+21	+9.9	+32.1
电影打力的电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影电影	27,000	116,000	80.600	9 777 000	100.00	28.00	+1.9	+2.3	+19.8	+30.6
See footnotes at end of table				200 000 00	18.8	28.80	4.5	410	10 8	

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APPENDIX B—Continued

Aid to families with dependent children: Recipients and payments to recipients, by State, July 1967 !- Continued

				Payme	Payments to recipients	ants		Percentage change from-	-mos legum	
		Number of recinients	racinionts		Average per-	- bet-	June 1967 in-	7 in-	July 1966 in-	uj
State	Number of families	Total 2	Children	Total	Family	Recipient	Number of recipients	Amount	Number of recipients	Amount
Maine	8, 600	20,700	15, 200	617,000	155.85	29.80	-1.0	6	+8.6	+8.9
Md.	24,900	101,000	77, 700	3, 877, 000	155.87	38. 60	+.9	+3.1	+11.8	+19.6
Mass. 1	33, 200	124,000	93, 200	6, 647, 000	200.02	53.45	+1.9	+3.2	+18.9	+42.1
Mich.s	40,700	168,000	127,000	7, 150, 000	176.05	42. 55	+.1	+1.1		+33.7
Minn	15,400	56, 400	43, 700	2, 795, 000	181, 25	49. 50	+-	+2.1	+-5.9	+11.9
Miss	22,400	93, 600	75, 600	779,000	34.75	8,30	+.+	-10.7	+0.7	+15.6
Mo	26, 200	109,000	84, 300	2, 721, 000	103, 70	24.90	ε	1	+1.9	+1.1
Mont	2,400	9,300	7, 200	363, 000	147. 50	37.90	. I	+1.6	+10.5	+14.0
Nebr.3	. 5,200	21, 100	16, 200	765,000	146.65	36, 35	+.7	+25.0	+13.3	+43.9
Nev	1,700	6,900	8, 400	217,000	124, 65	31, 55	-1.3	-1.3	+24.7	+28.9
N.II	1,400	5, 600	4, 200	221,000	163, 35	39, 75	1	+.7	+12.1	+12.8
N	33, 500	134,000	102,000	7, 519, 000	224, 66	56.05	4.0	**	+16.6	+31.4
N. Mex	8,800	36, 400	27, 700	1, 116, 000	127.00	30, 65	+1.4	+1.5	+14.6	+19.1
N.Y.s	176,000	710,000	521,000	38, 542, 000	218,85	84, 30	+1.0	10.1	+34.1	+32.6
N.C	25, 500	106,000	79,300	2, 616, 000	102, 55	24.90	-3.5	-2.8	œ. i	+4.4
N. Dak	2,200	9,100	6,900	417,000	186, 45	46.95	. i	+1.0	+12.4	+25.2
Ohio 1	. 48, 100	200,000	151,000	6, 717, 000	139.86	33, 55	+.7	+1.0	+8.1	+9.4
Okla.	22, 100	86, 600	66, 200	2, 985, 000	136.30	34, 45	9	9.1	+10.9	+12.4
Oveg.*	009'6	36,000	26,900	1, 455, 000	152,85	40.40	-7.2	-4.3	4-16.7	+28.3
Pa.s	62,000	266,000	197,000	9, 884, 000	159, 45	87, 15	1	+2.1	9.6+	+27.3
P.R.	38, 500	180,000	137,000	766,000	19,85	4.35	+3.8	9	-2.5	+2.0
R.L.	7, 200	28, 200	20,700	1, 182, 000	163, 50	42,00	+24	+3.3	+11.6	-1-20,3
8.C	0,300	24, 600	19,900	425,000	66,95	17.26	7	1	-5.5	+1.7
8. Dak	3,600	13, 600	10, 300	570,000	156.70	42,00	+3,1	+3.6	+10.7	+36.8

+10.5 +7.8 +16.9 +76.7 +62.5 +30.9 +31.8 -3.0 +21.9 +21.9
+ 10, 2 + 8, 0 + 22, 9 + 14, 2 + 17, 0 + 17, 0 + 2, 8 + 2, 8
+ + + + + + + + +
+ 1 . 1 + 1 . 1
20. 75 21. 30 38. 70 41. 80 24. 90 25. 30 47. 30 48. 65 37. 65
107.40 95.15 153.30 155.80 107.90 172.85 178.40 117.00 117.10
2, 486, 000 908, 000 289, 000 289, 000 41, 300 1, 577, 000 2, 783, 000 3, 472, 000 3, 377, 000 161, 000
70,000 73,700 17,000 6,200 41,600 41,900 68,200 8,300 3,300
91,000 106,000 22,500 7,200 1,700 88,200 54,500 4,300
22, 700 22, 800 5, 900 1, 900 12, 800 15, 400 13, 600 1, 100
Tonn Tox Tox Via Vi VI Va Va Va Wash Wash Wyo

1 All data subject to revision.

determining the amount of assistance.

Includes data on unemployed-parent segment; see table 7. Increases of less than 0.05 percent. * Includes as recipients the children and 1 or both parents or 1 caretaker relative other than a parent in families in which the requirements of such adults were considered in

Decrease of less than 0.05 percent.

· Represents data for June; July data not reported.

Aid to families with dependent children: Recipients and payments to recipients, by State, July 1968! [Excludes vendor payments for medical care and cases receiving only such payments]

				Payme	Payments to recipients	ents		Percentage change from-	-mori ague	
		Number of recipionts	ecipients		Average per-	- bet	June 1968 in-	-ui 8	July 1967 in-	-ul
State	Number of families	Total :	Children	Total	Family	Recipient	Number of recipients	Amount	Number of recipients	Amount
Total *	1, 397, 000	5, 633, 000	4, 226, 000	\$237, 502, 000	\$170,00	\$42.15	10.4	+1.2	+13.2	+28.1
Ala.	22,000	92,800	74,000	1, 407, 000	68.96	15.16	+2.6	+2.8	+30.3	+48.1
Alaska	1,600	5, 700	4, 400	220,000	136.16	38, 35	1.7	1.63	+14.1	+25.4
Aris	10, 200	42,800	32, 800	1, 233, 000	121. 80	28.80	-1.6	-1.7	1	ī
	8, 200	37,900	28, 700	722,000	78.10	19.02	-2.8	-3.9	+3.5	+1.0
Calif. 1	210,000	814,000	592,000	37, 930, 000	Me0. 66	46. 60	1.8	+1.8	+7.2	+18.7
Colo, 1 general reservations and the contract of the contract	14, 300	54,000	41,200	2, 159, 000	150, 75	39, 95	1.80	1.2	+1.3	+8.0
Conn. 8	17,300	06, 600	49, 700	3, 775, 000	218. 60	86.65	+1.5	+10.6	+17.0	+36.6
Del. 1	4, 200	17, 200	13,000	554,000	131, 25	32, 25	+	+.2	+19.0	+20.7
D.C	5,900	26, 800	21,400	1,049,000	178.90	39.15	+1.2	+2.0	+10.4	+14.8
	38, 600	152,000	121,000	3, 195, 000	82, 80	21.00	+1.8	+41.2	+6.6	+46.7
Ga.	29,800	117,000	90,100	2, 914, 000	97.80	24, 85	+1.9	+1.8	+22.0	+19.0
Guam '.	210	1,100	096	40, 200	188.95	35.00				
Hawaii 3	4,800	19, 700	14, 500	978,000	203, 10	49.75	1.13	+11.8	+6.3	+16.7
Idaho	3, 200	12, 100	8, 700	266,000	177.10	46.75	0.1	1.8	+7.0	+7.1
*******************************	65, 100	295, 000	230,000	12, 941, 000	198, 75	43.85	•	1	+15.0	+30.3
Ind	12,800	53, 300	40, 200	1, 719, 000	134, 10	\$2, 25	+.2	6	+8.3	+13.8
Iowa, and a second a second and	13, 600	52, 600	38, 400	2, 800, 000	190, 50	49.20	+1.0	+.9	+17.5	+34.1
Kans.	10,000	41, 300	32, 100	1,866,000	186, 50	45, 20	+.6	+3.4	+11.3	+16.6
Ky a ware and a same and a same a same a same a same	28, 300	110,000	80,000	3, 147, 000	111.30	28, 50	+1.1	+1.2	+11.9	+13.9
La	32, 600	143,000	111,000	3, 300, 000	103.85	23,70	+1.7	+1.8	+28.1	+22.1
Mulne.	6,000	22, 300	16, 300	606,000	110. 50	29.80	+.1	+.+	+7.9	+7.9
Md.º	28,000	112,000	86, 300	4, 400, 000	167.00	39, 45	+.3	+1.6	+10.8	+13.5
Mass.	41,000	150,000	112,000	8, 710, 000	212, 55	57,95	+.9	: ++	+30.9	+31.0

Mich.*	48, 300	197,000	148,000	8, 887, 000	184.10	45, 10	+1	9	+17.0	+34.1
Minn	17,000	61, 700	47,700	3, 368, 000	198, 25	54, 55	+1	+1.3	+9.3	+30.5
Missense 1 1 1 2 2 1 1 1 1 1 1 1 1 1 1 1 1 1 1	25, 300	103,000	84, 700	874,000	34.55	8, 50	+	+.6	+9.8	+12.2
Mo.	28,000	116,000	88, 900	3, 115, 000	111.40	28.95	9.1	+8.8	+6.7	+14.8
Mont	2,600	9,800	7, 500	365,000	138, 90	37, 10	-1.0	9	+5.6	+8.3
Nebr.3	6, 100	24, 300	18, 700	809,000	147.85	87.00	7	00	+16.4	+17.5
A0N	2,300	8, 700	6, 700	267,000	115,90	30.50	+2.2	6.+	+27.2	+38.0
N.H.	1,500	6,300	4,700	271,000	176.85	43, 30	+1.1	+1.0	+12.8	+22.9
	40, 200	100,000	121,000	9, 302, 000	231.45	58,30	+.0	+.7	+19.0	+28.7
N. Mox.	10,300	41,600	31, 400	1, 291, 000	125, 30	31.05	+.5	+1.2	+14.2	+18.6
N.Y.	224,000	874,000	640,000	62, 081, 000	277.20	71.00	+2.4	+1.3	+23.1	+60.9
N.C.	25, 600	104,000	78, 500	2, 831, 000	110, 70	27.30	-3.2	+2.1	-1.3	+8.2
N. Dak	2, 500	9,800	7, 800	468,000	188, 10	47.95	8.1	80.	+7.7	+12.4
Ohio 9	26,800	231,000	172,000	8, 669, 000	152, 75	37.60	(6)	+.3	+15.1	+20.0
Okla.	22,900	88, 400	66, 500	3, 052, 000	133, 35	34.50	1.3	9	+21	+2.8
Orog. 8	10, 100	37,900	27, 100	1, 537, 000	151.90	40.55	-4.2	1.00	+4.2	+5.6
	73, 700	307,000	225,000	12, 132, 000	164.70	39.45	+.8	+2.9	+15.6	+22.7
P.R.	35, 600	174,000	132, 000	1, 248, 000	35.06	7.15	+.6	-55.4	-3.1	+68.0
K.L.	8,000	30,800	22, 600	1, 452, 000	181.85	45.15	90	-2.1	+9.3	+22.8
8.C.	7,900	30,800	24, 700	867,000	72.08	18, 45	1	**	+26.2	+38.6
8. Dak	3, 700	13, 700	10, 300	908,000	164.70	44.25	00	-1.2	+1.0	+6.5
Tenn.	25, 400	100,000	77, 800	2, 620, 000	108, 25	26, 10	+	-1.3	+10.2	+7.6
Tox	30, 200	140,000	108, 000	2, 864, 000	98.00	20,46	0.1	*1	+32.9	+27.9
Utah *	6, 700	26, 300	18,900	1,020,000	151.85	38.80	-2.5	-1.0	+12.0	+12.8
V.	2, 800	9, 400	6,800	442,000	175, 20	47.10	+1.9	+2.6	+31.1	17.7
V.I	400	1, 600	1, 300	47, 200	117, 75	29,85	-2.5	+1.2	-2.8	+14.3
Va	14, 700	90, 600	46, 600	1,888,000	128, 60	31, 18	0	+.7	+12.2	+19.7
Wash.*	18, 100	68, 900	47, 400	3, 203, 000	177.00	48.60	+.7	+2.7	+13.1	+16.3
W. Va.	19,300	86, 300	60, 600	2, 213, 000	114.70	25.65	-2.1	-1.9	-10.8	-8.0
***************************************	18, 100	70, 200	52, 900	2, 634, 000	201,00	51.80	+.8	+3.6	+28.9	+82.9
Wyo	1, 200	4,400	3, 400	170,000	142.00	38, 25	-3.1	-27	+3.3	+5.1
All data subject to revision.				1 Inche	les data on mu	Includes data on meanilowed-narent esement: see takle 7	of secondary.	to table 7		

determining the amount of assistance.

*Includes as recipients the children and I or both parents or I caretaker relative other than a parent in families in which the requirements of such adults were considered in

¹ Includes data on unemployed-parent segment; see table 7.
⁴ Data for May; June and July data not reported.
¹ Increase of less than 0.05 percent.

· Decrease of less than 0.05 percent.

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Aid to families with dependent children: Recipicats of money payments and amount of payments, by State, July 1999 [Excludes vendor payments for institutional services in intermediate care facilities and for modical care and cases speaking only such payments]

				Paym	Payments to recipionts	ente		Percentage ch	Percentage change from-	
					Average per-	- bet-	June 1960 in-	-ui o	July 1968 in-	-uj
State	Number of	Total 1 Childre	Children	Total	Family	Recipient	Number of recipients	Amount	Number of recipients	Amount
Total 3.	1, 661, 000	6, 613, 000	4, 917, 000	\$283, 008, 000	8174.25	844.30	+0.8	+1.9	+17.8	+28.4
A Marie	2M 100	100 000	86.100	1.66.000	63.35	15.15	+2.6	4.6	+17.8	+17.7
Abaka	2.300	7,000	5.400	337,000	156.96	48.06	+.7	+1.1	+22,2	+58.3
Ariz	10,900	45,600	34,700	1,882,000	145.00	34. 70	4.8	+22.0	+6.5	+28.3
Ark	10,100	40,300	30, 800	794,000	78.50	19.75	-1.4	1.4	+6.0	+10.1
Calif.	270,000	1,006,000	721,000	50, 421,000	186.60		+.1	+.7	+23.6	+32.9
Colo3	15,700	87,700	43,700	2,343,000	148.80	40	+.8	+3.6	+6.7	+8.5
Conn	20,000	78, 100	88, 200	4, 625, 000	254.66	89,28	4	-1.7	+17.2	+22.8
Dela	4,700	18,400	13,800	900,000	128.05		+1.3	+1.4	+6.7	+9.3
D.C.	8,000	34,000	26,800	1,443,000	180.35		+3.2	-14.6	+77.1	+37.6
Fla	46,300	181,000	143,000	4,405,000	95.30		+1.4	+18.6	+18.8	+37.9
	44,700	171,000	130,000	4, 756, 000	106,40		+6.1	+20.4	+48.8	+68.3
Guem	320	1,500	1,800	82,800	167.65	34.30	+1.1	+2.7	+30.6	+11.4
Hawali J.	5, 500	22,000	16,000	1, 190, 000	216.60		+2.7	+16.5	+11.7	+21.7
Tdaho	3,500	13, 100	9,400	626, 000	177.95		+.7	+1.3	+7.8	+10.6
Ш	78, 100	338,000	262,000	17,002,000	217.78		+.3	+6.0	+14.4	+81.4
Ind	14,400	80,000	44,400	1,915,000	133, 10	32.45	-1.8	1.7	+10.7	+11.4
Towa	15,400	89,000	42,900	3,000,000	194, 25		+.3	+.7	+12.1	+15.8
Kans.	12,000	47,600	36, 700	2, 272, 000	189, 15	47.70	+1.5	+2.6	+16.4	+21.7
K	32, 100	134,000	86, 200	3, 618, 000	112, 56		+.4	+.6	+11.9	+15.0
_	42,000	180,000	139, 600	3,907,000	93.06		+1.2	-8.9	-25.8	+15.2
Maine 3.	8, 300	29,700	22,000	933,000	114,20	-	+1.4	-2.1	+32.8	+40.1
Md.s.	30,900	119,000	91,800	4,908,000	158.70		+1.3	+6.3	+6.9	+11.5
Mann 2	00,300	184,000	135,000	11, 580, 000	230, 10	62, 36	+1.6	+.6	+22.4	+32.9

Meh.	64,900	220,000	166,000	11, 263, 000	205.05	51.20	+1.8	+9.8	+11.6	+38.7
MINE	19, 100	96, 800	61,300	3, 918, 000	205.45	58.65	+1.0	+5.5	48.2	+16.3
MIN.	27, 100	108,000	88, 300	1, 137, 000	41.90	10.55	+1.6	+5.2	1	130 0
MO.	31,000	125,000	95,800	3, 464, 000	111.65	27.66	+.6	14.0	+8.6	+11.2
Mont	3, 200	11, 700	8,900	437,000	128, 56	37. 45	+1.9	+1.8	+18.7	+19.8
Neor Commence	6,900	28, 600	20, 400	1,006,000	146,00	37.90	+.1	+.7	+9.8	+12.0
	3,000	006 '6	7, 600	319,000	106.90	\$2,20	+8.0	+4.4	+12.8	+19.7
N. M. C.	1,900	7,800	6,800	341,000	176.06	43.80	+.8	+.3	+24.8	+28.6
N. Mariana Constitution of the Constitution of	86, 200	225,000	167,000	14, 565, 000	250.35	64.65	+2.1	1.6	+41.2	+56.6
N. Mol.	11,700	46, 300	34, 500	1, 430, 000	122.06	31.55	+1.1	+1.9	+9.0	+10.8
N. X. Constitution of the	261,000	1,007,000	728,000	64, 138, 000	245.95	62.70	+.1	-2.8	+18.2	+8.4
N.C.	28, 400	113,000	85, 200	3, 335, 000	117, 25	20, 55	-1.5	+1.9	+8.8	+17.8
Obt. 0	2,000	10, 200	7,800	618,000	194.70	50.80	+.6	+2.2	14.0	+10.2
Older	62, 100	248,000	186,000	9,858,000	158.70	30.80	1.1	+.4	+7.4	+13.7
ONE	24,000	80,900	67, 800	3,086,000	128.50	34.35	+1.1	+1.7	+1.6	+1.1
D. a	16,000	84, 400	38, 600	2, 574, 000	171.00	47.35	+4.6	+15.1	+63.6	+ 67.5
	94, 100	382, 000	278,000	20, 138, 000	213, 96	82.70	+1.6	+2.9	+20.1	+66.0
D F 2	40,700	201,000	149,000	1, 484, 000	41.35	8.40	+1.8	+5.6	+14.9	+36.0
0.0	6, 400	35, 600	25,900	1, 725, 000	184.40	48.40	+1.1	+1.0	+18.7	+18.8
O.C. services and a service and a services and a service and a servic	10,900	42,300	33,800	780,000	71.80	18, 45	+.2	+.1	+37.8	+37.6
6. Dak	4, 100	14,900	11, 200	000,000	167.75	45.50	1	-1.0	+8.9	+11.9
N	29, 800	112,000	86, 600	3,005,000	101.98	26.70	-1.1	+.8	+12.1	+14.7
· · · · · · · · · · · · · · · · · · ·	36,900	166,000	127,000	3, 099, 000	83, 95	18.75	1.3	+10.3	+18.3	+8.2
Ve a	7,900	20, 900	20, 200	1, 182, 000	149, 40	39.65	+.5	+4.8	+13.6	+16.9
	3, 100	11,300	8, 200	594,000	189, 80	82, 45	-1.3	+3.6	+20.8	+34.3
· 中華 日本	420	1,700	1,400	48, 300	113, 56	28.40	+.4	+.4	+7.8	+22
W	18,000	72, 200	26, 400	2, 963, 000	164.75	41.00	+1.6	+8.4	+19.2	+87.0
W. W	23, 800	82, 300	68,300	4, 648, 000	198.00	56, 50	+3.2	+20.9	+24.9	+46.1
Way Services and the se	19, 600	94, 500	89,000	2, 295, 000	116.90	27.18	+1.6	+8.0	-2.1	+3.7
With the same and	21, 800	82, 500	62, 100	4, 635, 000	212.30	26.15	1.1	+.2	+17.6	+27.6
Wyorman	1,200	4, 800	3, 400	169, 000	139,30	38.00	-1.3	-1.3	+.4	

¹ All data subject to revision. Data include nonmedical vendor payments other than those for institutional services in intermediate care facilities.
³ Includes as recipients the children and 1 or both parents or 1 caretaker relative other

han than a parent in families in which the requirements of such adults were considered in deformining the amount of assistance.

I Includes data or unemployed-parent segment; see table 8.

APPENDIX C

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE,
SOCIAL AND REHABILITATION SERVICE,
New York, N.Y., November 10, 1969.

Re Submittal No. S-33-69.

Mr. GEORGE K. WYMAN,

Commissioner, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203.

Dear Mr. Wyman: The schedules of monthly grants and allowances set forth in the above raise a question as to whether there is provision in the New York State plan for use of a statewide standard in determining need and payments with any variation in amounts for localities based on local differences in the cost of the items in the standard. (P.R. 20-7).

In this regard, we do not question that section 131-a(4) of the Social Services law would authorize a method of operation which is consistent with state-wideness requirements. However, there must be assurance that in implementing such provision, you will undertake to maintain the proper relationship to local costs and to exercise your power to promulgate revised schedules in any case in which you determine such revision is called for, i.e., that such action is not dependent on a request or application therefor by local authorities.

The regulations which you have promulgated establish four schedules of monthly grants and allowances

as opposed to the former three schedules. The additional schedule results from splitting districts which were previously included in one class; New York City is now treated separately from the Counties of Dutchess, Greene, Monroe, Nassau, Suffolk, Ulster and Westchester. Grants in the latter counties will now be approximately \$4.50 lower per person than in New York City. The fact that all these counties were previously classed together with New York City would itself constitute some evidence that you have previously found the cost of the items contained in the standard to be virtually the same in all these areas, and would therefore indicate the need for specific supporting data as to the basis for this particular differentiation.

In addition, analysis of the schedules as against the pre-added monthly allowances previously payable to families in which the oldest child was ten or eleven shows a much higher increase for New York City than for any other district. In this connection, it is noted that while the previous difference between SA-1 and SA-3 schedules for the highest and lowest cost districts amounted usually to between \$6 and \$8 in comparable family units, the difference now ranges from \$15 in a 2-person family to \$39 in a family of seven. Also, while the previous schedules provided a uniform figure of \$32 for additional persons, the new schedules provide \$43 in New York City and \$37 in every other district.

In your letter of June 2, 1969, you indicate that the differentiation between New York City and the rest of the State is based upon "its size and complexity, resulting in special requirements for transportation to use available services." It is difficult to understand how transportation costs could account for the differentiation in grant levels. Moreover, such differentia-

tion does not appear to be supported by the most recent information (Autumn 1968) from the Bureau of Labor Statistics on living costs within the State, e.g., such costs in Buffalo as compared to New York City.

In summary, the State standard must represent items of need to be made available to all recipients statewide. Differences in money amounts, if they exist, must result from demonstrable differences in the cost of these items in various sections of the State. Given the materials submitted to date, we are unable to find that there is in effect a statewide standard being uniformly applied throughout the State. We will, of course, give full consideration to any other information or comments which you may wish to submit.

We would appreciate as prompt a response as possible, whether in the form of a written reply or by way of a meeting with your staff.

Sincerely yours,

James Callison, Regional Commissioner. NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20548, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 540.—OCTOBER TERM, 1969

Julia Rosado et al., Petitioners,
v.
George K. Wyman, etc., et al.
On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[April 6, 1970]

Mr. JUSTICE HARLAN delivered the opinion of the Court.

The present controversy, which involves the compatibility of the New York Social Services Law (c. 184, L. 1969) with § 402 (a) (23), 42 U. S. C. § 602 (a) (23) (Supp. IV, 1968), of the Federal Social Security Act of 1935, arises out of a pendent claim originally included in petitioner's complaint bringing a class action challenging § 131-a of the same New York statute as violative of equal protection by virtue of its provision for lesser payments to Aid For Dependent Children recipients in Nassau County than those allowed for New York City residents. Pursuant to the recommendation of Judge Weinstein, a three-judge court was convened on April 24, 1969, and a hearing was held. 304 F. Supp. 1350.

Before a decision was rendered New York State amended § 131-a to permit the State Commissioner of Social Service to make, in his discretion, grants to recipients in Nassau County equal to those provided for New York City residents. The three-judge panel in a memorandum opinion of May 12, 1969, concluded that the equal protection issue was "no longer justiciable" and that "the constitutional attack on the provision [§ 131-a] as originally adopted has been rendered moot and any attack on the newly adopted subdivision would not be

An interlocutory appeal was taken to the Court of Appeals and the case was granted a calendar preference. After hearing oral argument the Court of Appeals, on June 11, entered an order staying the preliminary injunction pending its disposition of the appeal and later converted its stay into an order staying the permanent injunction subsequently issued by the District Court when it granted summary judgment on June 18, 1969. 304 F. Supp. 1381. On July 16, 1969, the Court of Appeals panel announced its judgment of reversal, accompanied by three opinions. 414 F. 2d 170. Chief Judge Lumbard and Judge Hays agreed that the three-judge panel properly dissolved itself and were of the view, for somewhat different reasons, that Judge Weinstein should not have ruled on the merits of petitioners' statutory claim: they also expressed their opinion that the singlejudge District Court (hereinafter District Court) erred

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¹ A separate action was subsequently brought again challenging the disparity in payments between New York and Nassau County welfare recipients. See Wyman v. Rothstein, — F. Supp. — (D. C. N. Y. 1969), prob. juris. noted, — U. S. — (1970).

on the merits. Judge Feinberg disagreed on all scores, expressing the view that the District Court properly reached and correctly decided the merits of the statutory claim.

Petitioner's application to the author of this opinion, as Circuit Justice, for a stay and an accelerated review was referred by him to the entire Court, and on October 13, 1969, certiorari was granted. 396 U. S. 815. The request for a stay was denied but the case was set down for early argument.

We now reverse. For essentially those reasons stated in the opinion of the District Court and Circuit Judge Feinberg's dissent, we think the District Court correctly exercised its discretion by proceeding to the merits. We are also unable to accept the conclusion reached by a majority of the Court of Appeals that § 402 (a) (23) does not affect States like New York which place no limitation on the level of payments of welfare benefits as determined by their standard of need. For reasons set forth in Part II, we conclude that the present New York program does not fulfill the requirements of § 402 of the federal statute.

I

A

We consider the threshold question of whether subject matter jurisdiction was vested in the District Court to decide this federal statutory challenge to the New York Social Welfare Law.

That the three-judge court itself not only had jurisdiction but would be obliged to adjudicate this statutory claim in preference to deciding the original constitutional claim in this case follows from King v. Smith, 392 U. S. 309 (1968), where, on an appeal from a three-judge court, we decided the statutory question in order to avoid a constitutional ruling. 392 U. S., at 312 n. 3.

In the case before us the constitutional claim was declared moot prior to decision by the three-judge court and the question arises whether that circumstance removed not only the obligation but destroyed the power of a federal court to adjudicate the pendent claim.2 We think not. Jurisdiction over federal claims, constitutional or otherwise, is vested, exclusively or concurrently. in the federal district courts. Such courts usually sit as single-judge tribunals. While Congress has determined that certain classes of cases shall be heard in the first instance by a district court composed of three judges, that does not mean that the court qua court loses all jurisdiction over the complaint that is initially lodged with it. To the contrary, once petitioners filed their complaint alleging the unconstitutionality of § 131-a. the District Court sitting as a one-man tribunal, was properly seised of jurisdiction over the case under § 1343 (3)(4) of Title 28 and could dispose of even the constitutional question either by dismissing the complaint for want of a substantial federal question. Ex parte Poresky, 290 U.S. 30 (1933),3 or by granting

² Judge Hays expressed the view:

[&]quot;Since the single judge at no time had jurisdiction over the constitutional claim there was never a claim before him to which the statutory claim could have been pendent. If the three-judge Court had attempted to give the single judge power to adjudicate the statutory claim, it could not have done so, since with the dissolution of the three-judge Court the statutory claim was no longer pendent to any claim at all, much less to any claim over which the single judge could exercise adjudicatory power."

³ Even if *Poresky* is read simply as a restatement of the truism—that a court always has jurisdiction to determine its own jurisdiction—in view of the now settled rule that the insubstantiality of a federal question is the occasion for a jurisdictional dismissal as opposed to a dismissal on the merits for failure to state a claim upon which relief can be granted, it still lends support to the proposition that jurisdiction is vested in the outset in the district court and not the three-judge panel.

requested injunctive relief if "prior decisions [made] frivolous any claim that [the] state statute on its face [was] not unconstitutional." Bailey v. Patterson, 369 U. S. 31, 33 (1962). Even had the constitutional claim not been declared moot, the most appropriate course may well have been to remand to the single district judge for findings and the determination of the statutory claim rather than encumber the District Court, at a time when district court calendars are overburdened, by consuming the time of three federal judges in a matter that was not required to be determined by a three-judge court. See Swift & Co. v. Wickham, 382 U. S. 111 (1965).

On remand the District Court correctly considered mootness a factor affecting its discretion, not its power, and balanced the policy considerations that have spawned the doctrine of pendency and the countervailing policy of federalism: the extent of the investment of judicial energy and the character of the claim. Not only had there been hearings and argument prior to dismissal of the constitutional claim, but the statutory question is so essentially one "of federal policy that the argument for the exercise of pendent jurisdiction is particularly strong." 4 United Mine Workers v. Gibbs, 383 U. S. at 727.

Respondents analogize dismissal for mootness to dismissal for want of a substantial claim and rely on language in *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), to the effect that a federal court should not pass on a state claim when the federal claim falters at the threshold and is "dismissed before trial." The argu-

We intimate no view as to whether the situation might have been different had the constitutional claim become most before the District Court had invested substantial time in its resolution.

See United Mine Workers v. Gibbs, 383 U.S., at 725, where the Court mid:

[&]quot;... [I]f, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be

ment would appear to be that thee a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim. They contend that mootness, like insubstantiality, is a threshold-jurisdictional defect.

Whether or not the view that an insubstantial federal question does not confer jurisdiction—a maxim more ancient than analytically sound—should now be held to mean that a district court should be considered without discretion, as opposed to power, to hear a pendent claim, we think the State's analogy fails. Unlike insubstantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended looking towards the resolution of a dispute that plaintiffs were entitled to bring in a federal court.

We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. The Court has shunned this view. See Moore v. New York Cotton Exch., 270

expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole."

^a A persuasive analogy is to be found in the well-settled rule that a federal court does not lose jurisdiction over a diversity action which was well-founded at the outset even though one of the parties may later change domicile or the amount recovered falls short of \$10,000. See Smith v. Sperling, 354 U. S. 91, 93 n. 1 (1957); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 289-290 (1938); Smithers v. Smith, 204 U. S. 632 (1907); see generally, C. Wright, Federal Courts § 33, at 93-94 (1954).

U. S. 593 (1926); Hurn v. Oursler, 289 U. S. 238 (1933) (dictum).

B

A further reason given to support the contention that the District Court should have declined to exercise jurisdiction is that the Department of Health, Education, and Welfare was the appropriate forum, at least in the first instance, for resolution on the merits of the questions before us, and that at the time this action came to Court HEW was "engaged in a study of the relationship between Section 602 (a)(23) and Section 131-a." 414 F. 2d, at 176 (opinion of Judge Hays).

r Since we conclude that the District Court properly exercised its pendent jurisdiction, we have no occasion to consider whether, as urged by petitioners, this statutory claim satisfies the \$10,000 amount-in-controversy requirement of the general federal jurisdiction provision, 28 U. S. C. § 1331, or whether it could be maintained under 28 U. S. C. § 1343 (3), which contains no amount-in-controversy limitation, as an action "to redress the deprivation, under color of any state law . . . of any right, privilege, or immunity secured by . . . sny Act of Congress providing for equal rights of citisens . . . " See King v. Smith, 392 U. S., at 312, n. 3; see generally, Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).

^{*}In order to evaluate this argument, it is necessary to understand the mechanism by which HEW reviews state plans under the AFDC program. States desiring to obtain federal funds available for AFDC programs are required to submit a plan to the Secretary of HEW for his approval. 42 U. S. C. § 601. Once initially approved, federal funds are provided to the State until a change in its plan is formally disapproved. 42 U. S. C. § 604 (a). The Secretary must afford the State notice of an alleged noncompliance with federal requirements and an opportunity for a hearing. Ibid. If after notice and hearing the Secretary finds that the State does not comply with the federal requirements, he is directed to make a total or partial cutoff of federal funds to the State. Ibid. 42 U. S. C. § 1316 describes the administrative procedures which the

Petitioners answer, we think correctly, that neither the principle of "exhaustion of administrative remedies" nor the doctrine of "primary jurisdiction" has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures whereby welfare recipients may trigger and participate in the Department's review of state welfare programs. Cf. Abbott Laboratories v. Gardner, 387 U. S. 136 (1967); K. Davis, Administrative Law § 19.01 (1965); L. Jaffe, Judicial Control of Administrative Action 425 (1965).

That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency which is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation, published opinion, or in cases where there is real doubt as to how the Department's standards apply to the particular state regulation or program.*

Secretary must afford a State before cutting off funds, and also provides for review in the courts of appeals of the Secretary's action at the behest of the State. Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims.

^{*}As we observed in Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 360 U. S. 411, 420 (1959), that an issue is "one appropriate ultimately for judicial rather than administrative resolution . . . does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant . . . facts which the administrative agency charged with regulation of the transaction . . . is peculiarly well equipped to marshal and initially to evaluate." See also Far East Conference v. United States, 342 U. S. 570, 574-575.

The District Court, in this instance, made considerable effort to learn the views of HEW. The possibility of HEW's participation, either as a party or an amicus, was explored in the District Court and the Department at that stage determined to remain aloof. We cannot in these circumstances fault the District Court for proceeding to try the case.

II

We turn to the merits which may be broadly characterized as involving the interpretation of § 402 (a) (23) of the 1967 amendments to the Social Security Act and their application to certain changes inaugurated by New York in its method of computing welfare benefits that has resulted in reduced payments to these petitioners and, on a broader scale, decreased by some \$40 million the State's public assistance undertaking.

A

We begin with a brief review of the general structure of the Federal Program for Aid for Dependent Children (AFDC), one of the four "categorical assistance" programs established by the Social Security Act of 1935.¹⁰

The general topography of the AFDC program was mapped in part by this Court in King v. Smith, 392 U. S. 309 (1968), and several lower court opinions, in addition to the opinion below, have surveyed the pertinent statutory and regulatory provisions. While participating States must comply with the terms of the federal

¹⁰ The four categorical assistance programs are the Old Age Assistance Act (OAA), 42 U. S. C. § 301 et seq.; Aid to Families With Dependent Children (AFDC), 42 U. S. C. § 601 et seq.; Aid to the Blind (AB), 42 U. S. C. § 1201 et seq.; Aid For the Permanently and Totally Disabled (APTD), 42 U. S. C. § 1351 et seq. ¹¹ See Lampton v. Bonin, 299 F. Supp. 336, 304 F. Supp. 1384 (D. C. E. D. La. 1969); sefferson v. Hackney, 304 F. Supp. 1332 (D. C. N. D. Tex. 1969); Dandridge v. Williams, 297 F. Supp. 450, prob. juris. noted, 396 U. S. 311 (1969).

legislation, see King v. Smith, supra, the program is basically voluntary and States have traditionally been at liberty to pay as little or as much as they choose, and there are, in fact, striking differences in the degree of aid provided among the States.

There are two basic factors that enter into the determination of what AFDC benefits will be paid. First, it is necessary to establish a "standard of need," a yardstick for measuring who is eligible for public assistance. Second, it must be decided how much assistance will be given, that is, what "level of benefits" will be paid. On both scores Congress has always left to the States a great deal of discretion. King v. Smith, 392 U.S., at 318. Thus, some States include in their "standard of need" items which others do not take into account. Diversity also exists with respect to the level of benefits in fact paid.12 Some States impose so-called dollar maximums on the amount of public assistance payable to any one individual or family. Such maximums establish the upper limit irrespective of how far short the limitation may fall of the theoretical standard of need. Other States curtail the payments of benefits by a system of "ratable reductions" whereby all recipients will receive

¹³ According to information supplied by the Department of HEW in 1967, reported in the Explanation of Provisions of H. R. 5710, at 36, \$3,100 annually for a family of four marked the "poverty" level. According to the report, "Although a few States define need at or above the poverty level, no State pays as much as that amount." It further appears that at that time 33 States provided less than their avowed standard of need which frequently fell short of the poverty mark. While New York purports to have paid its full standard, it would thus appear not to have paid enough to take a family out of poverty. See Hearings before the Committee of Ways and Means, House of Representatives, on 14 R 5710, at 118 (90th Cong., 1st Sess., 1967).

a fixed percentage of the standard of need.¹³ It is, of course, possible to pay 100% of need as defined. New York, in fact, purports to do so.

B

In 1967 the Administration introduced omnibus legislation to amend the social security laws. The relevant AFDC proposals provided for more adequate assistance to welfare recipients and set up several programs for education and training accompanied by child care provisions designed to permit AFDC parents to take advantage of the training programs. In the former respect the AFDC proposals paralleled other provisions that put forward amendments to adjust benefits to recipients of other categorical aid to reflect the rise in the cost of living. Thus, in its embryo stage § 402 was § 202 (b) of the Administration bill, H. R. 5710, 90th Cong., 1st Sess. (1967), which would have added to § 402 (a) of the Social Security Act the following clause:

"(14) provide (A), effective July 1, 1969, for meeting (in conjunction with other income that is not disregarded under the plan and the other resources) all the need as determined in accordance with the standards applicable under the plan for determining

¹⁸ A maximum may either be fixed in relation to the number of persons on welfare, e. g., X dollars per child, no matter what age, or in terms of a family, X dollars per family unit, irrespective of the number of persons in the unit. This latter procedure has been challenged on equal protection grounds, see Dandridge v. Williams, supra. A "ratable reduction" represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income which is first deducted, the ratable reduction is applied to the amount by which the individual or family income falls short of need.

¹⁴ See § 202 (a) (c) (d) and (e).

need of individuals eligible to receive aid to families with dependent children (and such standards shall be no lower than the standards for determining need in effect on January 1, 1967) and (B) effective July 1, 1968, for an annual review of such standards and (to the extent prescribed by the Secretary) for up-dating such standards to take into account changes in living costs." (Emphasis added.)

Section 202 (b), however, was stillborn and no such provision was contained in the ultimate bill reported out by the House Ways and Means Committee. See H. R.

12080, 90th Cong., 1st Sess.

The Administration's renewed efforts, on behalf of a mandatory increase in benefit payments under the categorical assistance programs, 15 met with only limited success, 'resulting in § 213 (a) of the Senate version which provided for a mandatory \$7.50 per month increase in the standards and benefits for the adult categories and § 213 (b) which is, in substance, the present § 402 (a)(23). The Committee's comment on § 213 (b), to the effect

"We strongly urge you to adopt the Administration's proposal requiring States to meet need in full as they determine their own state assistance standards, and to update these standards periodically to keep pace with changes in the cost of living." Hearings before the Senate Committee on Finance on H. R. 12080, Part I, at 216 (90th Cong., 1st Sess., August 1967). See also testimony of Wilbur

Cohen. Id., at 255-259.

¹⁵ Secretary Gardner testified:

[&]quot;The House bill does nothing to improve the level of state public assistance. As things stand today, the States are required to set assistance standards for needy persons in order to determine eligibility-but they need not make their assistance payments on the basis of these standards. The result is that welfare payments are much too low in a good many States. That is a widely accepted fact among all who are concerned with these programs; indeed, it is probably the most widely agreed-upon fact among welfare experts today.

that States would be required "to price their standards... to reflect changes in the cost of living," tracks the statutory language.16

The Conference Committee eliminated the Senate provision in § 213 which would have required an annual adjustment for cost of living, and § 402 was enacted. It now provides:

"[The States shall] provide that by July 1, 1969, the amounts used by the State to determine needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were

"To accomplish these changes, the States would have to adjust their standards and any maximums imposed on payments by July 1, 1968, so as to produce an average increase of \$7.50 from assistance alone or assistance and social security benefits (or other income). Any State which wishes to do so can claim credit for any increase it may have made since December 31, 1966. Thus, no State needs to make an increase to the extent that it has recently done so.

"States would be required to price their standards used for determining the amount of assistance under the AFDC program by July 1, 1969 and to reprice them at least annually thereafter, adjusting the standards and any maximums imposed on payments to reflect changes in living costs." S. Rep. No. 744, at 169–170 (90th Cong., 1st Sees., 1967): see also id., at 293.

¹⁶ The comment to § 213 in the Senate Report reads:

[&]quot;Social security benefits have been increased 15 percent across the board by the committee with a minimum of \$70, for an average increase of 20 percent. However, there is no similar across-the-board increase in the amount of benefits payable to aged welfare recipients. . . . In view of this situation and the need to recognize that the increase in the cost of living since the last change made in the Federal matching formula in 1965 also is detrimental to the well-being of these recipients, the committee is recommending a further change in the law. It is proposed that the law be amended to provide that recipients of old-age assistance, aid to the blind, and aid to the permanently and totally disabled shall receive an average increase in assistance plus social security or assistance alone (for the recipients who do not receive social security benefits) of \$7.50 a month. . . .

established and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

C

The background of § 402 reveals little except that we have before us a child born of the silent union of legislative compromise. Thus, Congress, as it frequently does, has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding. Our chief resources in this undertaking are the words of the statute and those common-sense assumptions that must be made in determining direction without a compass.

Reverting to the language of § 402 we find two separate mandates: first, the States must re-evaluate the component factors that comprise their need equation;

and, second, any "maximums" must be adjusted.

We think two broad purposes may be ascribed to § 402: First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of § 402, a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the actual standard of need.

The Congressional purpose we discern does not render § 402 a meaningless exercise in "bookkeeping." Congress, sometimes, legislates by innuendo, making declarations of policy and indicating a preference while requiring measures which, though falling short of legislating its goals, serve as a nudge in the preferred directions. In

§ 402 Congress has spoken in favor of increases in AFDC payments. While Congress rejected the mandatory adjustment provision in the administration bill, it embodied in legislation the cost-of-living exercise which has both practical and political consequences.

It has the effect of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in light of economic realities and placing them among those eligible for the care and training provisions. Secondly, while it leaves the States free to effect downward adjustments in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a State to accept the political consequence of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable. Lastly, by imposing on those States that desire to maintain "maximums" the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat "maximum" system, thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system which will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given.

While we do not agree with the broad interpretation given § 402 by the District Court, 17 we cannot accept the

¹⁷ The District Court, while disclaiming any construction of § 402 (a) (23) that would preclude converting to a flat grant system by averaging, concluded: "section 402 (a) (23) precludes a state from making changes resulting in either reduced standards of need or levels of payments." 304 F. Supp., at 1377. (Emphasis added.) An extensive alteration in the basic underlying structure of an established program is not to be inferred from ambiguous language which is not clarified by legislative history. Such legislative history as there is suggests the opposite. The Senate's failure to adopt the Administration's proposals and its failure to provide for AFDC

conclusion reached by the two-judge majority in the Court of Appeals—that § 402 does not affect New York. It follows from what we fathom to be the congressional purpose that a State may not redefine its standard of need in such a way that it circumnavigates around the requirement of re-evaluating its existing standard. This would render the cost-of-living reappraisal a futile, hollow, and, indeed, a deceptive gesture, and would avoid the consequences of increasing the numbers of those eligible and facing up to the failure to allocate sufficient funds to provide for them.

These conclusions, if not compelled by the words of the statute nor manifested by legislative history, represent the natural blend of the basic axiom—that courts should construe all legislative enactments to give them some meaning—with the compromise origins of § 402, set forth above. This background, we think, precludes the more adventuresome reading that petitioners and the District Court would give the statute. See n. 17, supra. This reading is also buttressed by the fact that this

recipients an increase like that provided for the adult program, notwithstanding a proposed amendment to that effect by Senator McGovern gives rise to an inference, not negatived by the noncommittal and unilluminating comments of the committee, see n. 16, supra, that Congress had no such purpose. These considerations, we think, foreclose the broad construction adopted by the District Court.

¹⁸ While it might be technically said that there was no majority holding on the merits in the Court of Appeals, this overlooks Judge Hays' preface to his discussion of the merits: "Although we are persuaded that the district judge had no power to adjudicate this action, we turn to a brief discussion of the merits, since our decision does not rest solely on jurisdictional grounds." 414 F. 2d, at 178. Chief Judge Lumbard disavowed reaching the merits but expressly disagreed with Judge Feinberg. 414 F. 2d, at 181. In these circumstances, it would be hypertechnical to conclude that the merits had not been faced and decided below such as to make a remand desirable prior to review and decisions by this Court. Cf. Barlow v. Collins, — U. S. — (1970).

construction has been placed on the statute by the Department of Health, Education, and Welfare. While, in view of Congress' failure to track the Administration proposals and its substitution without comment, of the present compromise section, HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise, it is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers. Cf. Zuber v. Allen, 396 U. S. 168, 192 (1969); Udall v. Tallman, 380 U. S. 7 (1965).

D

While the application of the statute to the New York program is by no means simple, we think the evidence adduced supports the ultimate finding of the District Court, unquestioned by the Court of Appeals, that New York has, in effect, impermissibly lowered its standard of need by eliminating items that were included prior to the enactment of § 402.

Prior to March 31, 1969, New York computed its standard of need on an individualized basis. Schedules existed showing the cost of particular items of recurring need, for example, food and clothing required by children at given ages. Payments of "recurring" grants were made to families based on the number of children per household and the age of the oldest child. Additional payments, designated as "special needs grants," were also made. Under an experiment in New York City instituted August 27, 1968, many allowances for special needs were eliminated and a flat grant of \$100 per person was substituted.

Chapter 184 of the Session Laws, the present § 131-a, radically altered the New York approach. In lieu of

¹⁹ The regulations and explanations are set forth in the Government's amicus memorandum.

individualized grants for "recurring" needs to be supplemented by special grants or the flat \$100 grant, New York adopted a system fixing maximum allowances per family based on the number of individuals per household. The maximum dollar amounts were established by ascertaining "the mean age of the oldest child in each size family." See Memorandum of Law in support of Defendants' Motion for Summary Judgment, pp. 9-10. While these family maximums are exclusive of rent and fuel costs, the District Court found that "special grants were seemingly not included in these computations. No attempt was made to average them out across the State and then add that figure to that of the basic recurring grant." 304 F. Supp., at 1368.

The impact of the new system has been to reduce substantially benefits paid to families of these petitioners and of those similarly situated, and to decrease benefits to New York City recipients by almost \$40,000,000. 304 F. Supp., at 1369–1370. The effect of the new program on upstate cases is less severe, with gains to some families apparently cancelling out losses to others, but the net effect is a drastic reduction in overall payments since New York City recipients comprise approximately 72% of the States's welfare clientele. 304 F. Supp., at 1369.

E

Notwithstanding this \$40,000,000 decrease in welfare payments after adjustment for increases in the cost of living, the State argues that the present § 131-a represents neither an attempt to circumvent federal requirements nor a reduction in the content of its former standard. The conversion to a flat grant maximum system is justified as an advance in administrative efficiency.²⁰

²⁰ New York points to the preamble to § 131-a which sets forth as its purpose the streamlining of administration of the welfare grant system and relies on that part of the HEW program that invites

While § 402 (a) (23) does not prevent the States from pursuing what is beyond dispute the laudable goal of administrative efficiency,²¹ we think Congress has fore-closed them from achieving this purpose at the expense of significantly reducing the content of their standard of need. The findings and conclusions of the District Court, undisturbed by the Court of Appeals and supported by the record, clearly demonstrate that a significant reduction has here occurred. It is conceded by respondents that the present program does not include allowances for the items formerly covered by the so-called "special" grants.

We have no occasion to decide on the record before us whether we agree with that part of HEW's interpretation of § 402 that might approve elimination of grants for particular needs, without some averaging or other provision therefor such as direct payments to the provider of services. It suffices in this case that particular items, such as laundry, telephones, had formerly been deemed essential by New York, and were considered regular recurring expenses to a significant number of New York City welfare residents. We need look no farther than the state social service department's own regulations and the action taken by the state administrators in providing the \$25/quarter cyclical grant to city residents in the 1968 pilot project.

the States to adopt administrative programs that curtail unnecessarily burdensome calculations and paperwork.

²¹ HEW's position set forth in its Amicus Brief, p. 12, seems to be that under its regulations, a "reduction in content" does not necessarily result from "reductions in the recognition of special needs." The Department has, however, recognized both administratively and in its brief that certain "special" needs should properly be regarded as part of the basic standard. Thus, while the brief suggests that payments for special diets or special attendants are extraordinary and not susceptible of averaging, it leaves open the question whether New York's special grants have not been for recurring items which are basic.

Thus, the state social service department's own regulations provided:

"An individual or family shall be deemed 'in need' when a budget deficit exists or when the budget surplus is inadequate to meet one or more non-budgeted special needs required by the case circumstances and included in the standards of assistance."

18 N. Y. C. R. R. § 353.1 (c)." (Emphasis added.)

This persuasive, if not conclusive, evidence of what constituted the standard of need is further supported by testimony of the administrators of New York's welfare program to the effect that these grants covered costs for essentials of life for numerous welfare residents in New York City.

F

We reach our conclusions without relying on the finding made by the court below that in § 131-a New York was attempting to constrict its welfare payments. Speculation as to legislative and executive motive, is to be shunned. Section 402 (a) (23) invalidates any state program that substantially alters the content of the standard of need in such a way that it is less than it was prior to the enactment of § 402 (a) (23), unless a State can demonstrate that the items formerly included no longer constituted part of the reality of existence for the majority of welfare recipients. We do not, of course, hold that New York may not, consistently with the federal statutes, consolidate items on the basis of statistical averages. Obviously such averaging may affect some families adversely and

²² See also former 18 N. Y. C. R. R. § 351.2, Aspects of Eligibility. "Social investigation shall cover the following aspects of initial and continuing eligibility. (b) Need, consideration shall be given to individual and family requirements for the items of basic maintenance and for items of special need. . . ."

benefit others. Moreover, it is conceivable that the net payout, assuming no change in the level of benefits, may be somewhat less under a streamlined program. Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with § 402 redefine its method for determining need. A State may, moreover, as we have noted, accommodate any increases in its standard by reason of "cost-of-living" factors to its budget by reducing its level of benefits. What is at the heart of this dispute is the elimination of special grants in the New York program, not the system of maximum grants based on average age. Lest there be uncertainty we also reiterate that New York is not foreclosed from accounting for basic and recurring items of need formerly subsumed in the special grant category by an averaging system like that adopted in the 1968 New York City experiment with cyclical grants.

Ш

New York is, of course, in no way prohibited from using only state funds according to whatever plan it chooses, providing it violates no provision of the Constitution. It follows, however, from our conclusion that New York's program is incompatible with § 402, that petitioners are entitled to delaratory relief and an appropriate injunction by the District Court against the payment of federal monies according to the new schedules, should the State not develop a conforming plan within a reasonable period of time.

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds 22

for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program. Cf. Abbott Laboratories v. Gardner. 387 U. S. 136 (1967): Association of Data Processing v. Camp. -U. S. — (1970); Barlow v. Collins. — U. S. — (1970). We adhere to King v. Smith, 392 U. S. 309 (1968). which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief and held Alabama's "substitute father" regulation to be inconsistent with the federal statute. While Kino did not advert specifically to the remedial problem, the unarticulated premise was that the State had alternative choices of assuming the additional cost of paying benefits to families with substitute fathers or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements.

The prayer in the District Court in King v. Smith. as in the case before us, was for declaratory and injunctive relief against the enforcement of the invalid provision. 277 F. Supp. 31 (D. C. M. D. Ala. 1967). We see no justification in principle for drawing a distinction between invalidating a single nonconforming provision or an entire program. In both circumstances federal funds are being allocated and paid in a manner contrary to that intended by Congress. In King the withholding of benefits based on the invalid state regulation resulted in overpayments to some recipients, assuming a constant state welfare budget, and a corresponding misallocation of matching federal resources. In the case before us, noncompliance with § 402 (a) (23) may result in limiting the welfare rolls unduly and thus channeling the matching federal grants in a way not intended by Congress. We may also assume that Congress would not countenance the circumnavigation of the political consequences of § 402, see Part C, supra, by permitting State to use federal funds while obscuring the actual extent to which their programs fall short of the ideal.

Unlike King v. Snith, however, any incremental cost to the State, assuming a desire to comply with § 402, is massive; nor is there a discrete and severable provision whose enforcement can be prohibited. Accordingly, we remand the case to the District Court to fix a date which will afford New York an opportunity to revise its program in accordance with the requirements of § 402 if the State wishes to do so. The District Court shall retain jurisdiction to review, taking into account the views of HEW should it care to offer its recommendations, any revised program adopted by the State, or, should New York cloose not to submit a revamped program by the determined date, issue its order restraining the further use of federal monies pursuant to the present statute.

In conclusion, we add simply this. While we view with concern the escalating involvement of federal courts in this highly compicated area of welfare benefits, 23 one

The judiciary is being called upon with increasing frequency to review not only the viability of state welfare procedures, e. g., Goldberg v. Kelly, and Wheler v. Montgomery, — U. S. — (1970); Wyman v. James, — F. Supp. — (D. C. S. D. N. Y. 1969), prob. juris. noted, — U. S. — (1970) (inspections of the house), but the substance and structure of state programs and the validity of innumerable individual provisions. See, e. g., Shapiro v. Thompson, 394 U. S. 618 (1969) (psiding requirements); King v. Smith, supra (substitute father); Shapiro v. Solman, 300 F. Supp. 409, aff'd, 396 U. S. 5 (1969); Lewis v. Martin, — F. Supp. — (D. C. N. D. Cal. 1968) (prob. juris. noted, 396 U. S. 900 (1969) ("man-in-the-house rule"). At leas two other actions have been instituted to review various aspecs of state programs in light of the statutory provisions involved in this case. See Lampton v. Bonin, 299 F.

that should be formally placed under the supervision of HEW, at least in the first instance, we find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field. It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal. in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use. As Mr. Justice Cardozo stated, speaking for the Court in Helvering v. Davis, 301 U. S. 619, 645 (1937): "When [federal] money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States." Cf. Lassen v. Arizona, ex rel. Arizona Highway Dept., 385 U.S. 458 (1967).

The judgment of the Court of Appeals is reversed and the case is remanded to that court for further pro-

ceedings consistent with this opinion.

It is so ordered.

Supp. 336, 304 F. Supp. 1384 (D. C. E. D. La. 1969); Jefferson v. Hackney, 304 F. Supp. 1332 (D. C. N. D. Tex. 1969); cf. Wyman v. Rothstein, supra; Dandridge v. Williams, decided today, — U. S. — (1970).

SUPREME COURT OF THE UNITED STATES

No. 540.-- OCTOBER TERM, 1969

Julia Rosado et al., Petitioners, v.

George K. Wyman, etc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[April 6, 1970]

Mr. JUSTICE DOUGLAS, concurring.

While I join this opinion of the Court, I add a few words.

I

Our leading case on pendent jurisdiction is United Mine Workers v. Gibbs, 383 U. S. 715, 721-729. In line with Gibbs, the courts below distinguished between the power to exercise pendent jurisdiction and the discretionary use of that power. Gibbs abandoned the "single cause of action" test which had been the controlling standard under Hurn v. Oursler, 289 U. S. 238, and instead held that pendent jurisdiction exists when "the state and federal claims . . . derive from a common nucleus of operative fact" and "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." 383 U. S., at 725.

The claims presented in this case attacked the New York statute on two grounds. The constitutional ground attacked the differential in the level of welfare payments between New York City and Nassau County. The statutory claim attacked the State's reduction in the overall level of payments, on the ground that it violated § 402 (a) (23) of the Social Security Act, 81 Stat. 898, 42 U. S. C. § 602 (a) (23) (1964 ed., Supp. IV), which

requires States to make cost-of-living adjustments in the amounts used to determine need. No argument is made by any of the parties in this case that the three-judge court did not have pendent jurisdiction over the statutory claim. The sole basis for respondents' contention that pendent jurisdiction is not present in this case flows from the action of the three-judge court in remanding the case to the single district judge "for further proceed-

ings as are appropriate."

Yet if the three-judge court had pendent jurisdiction over the statutory claim, it had the power to decide that claim despite the dismissal of the constitutional claim. This Court held in United States v. Georgia Pub. Serv. Comm'n, 371 U. S. 285, 287-288: "Once [a three-judge court is convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." See also Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73, 80-81. There is no rule, however, holding that a three-judge court is required to decide all the claims presented in a suit properly before it, although the practice of a three-judge court remaiding a case to the initial district judge for further proceedings seems to have been little used. See Landrey v. Daley, 288 F. Supp. 194.

What united Judges Hayes and Lumbard was the view that as a matter of discretion, the District Court should have refused to exercise its pendent jurisdiction. The factors outlined in Gibbs to guide the discretionary exercise of pendent jurisdiction are those of "judicial economy, convenience and fairness to the litigants." 383

U. S., at 726.

The main distinction between this case and Gibbs is that the pendent claim here was one of federal rather than state law. And it is clear from the opinion in Gibbs that the factor of federal-state comity is highly relevant in deciding whether or not the exercise of rendent jurisdiction is proper. Thus the Court stated: "There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." Id., at 727. Since the claim involved here is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances should be required to prevent the exercise.

Moreover, incident to the issuance of a temporary restraining order, prior to the empaneling of the three-judge court, District Judge Weinstein had received and considered substantial testimony, affidavits and briefs, such that he required no further hearings or testimony prior to issuing his preliminary injunction opinion three days after the case was remanded to him. In light of this fact, considerations of economy, convenience, and fairness all point to the exercise of pendent jurisdiction. See Moore v. New York Cotton Exchange, 270 U. S. 593, 608-610.

п

The fact that the Department of Health, Education, and Welfare is studying the relationship between the contested provision of the New York statute and the relevant section of the Social Security Act is irrelevant to the judicial problem. Once a State's AFDC plan is initially approved by the Secretary of Health, Education, and Welfare, federal funds are provided the State until the Secretary finds, after notice and opportunity for hearing to the State, that changes to the plan or the administration of the plan are in conflict with the federal requirements. Social Security Act § 404 (a), 49 Stat. 628, as amended, 42 U. S. C. § 604 (a) (1964 ed., Supp. IV).

The statutory provisions for review by HEW of state AFDC plans do not permit private individuals, namely present or potential welfare recipients, to initiate or participate in these compliance hearings. Thus, there is no sense in which these individuals can be held to have failed to exhaust their administrative remedies by the fact that there has been no HEW determination on the compliance of a state statute with the federal requirements. In the present case, that problem was discussed in terms of the District Court's discretion to refuse to exercise pendent jurisdiction. The argument for such a refusal has little to commend it. HEW has been extremely reluctant to apply the drastic sanction of cutting off federal funds to States which are not complying with federal law. Instead, HEW usually settles its differences with the offending States through informal negotiations. See Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84, 91-92 (1967).

Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims. Their refusal to act merely forces plaintiffs into the state courts which certainly are no more competent to decide the federal question than are the federal courts. The terms of the New York statute are clear, and there is no way in which a state court could interpret the challenged law in a way which would avoid the statutory claim pressed here.

State participation in federal welfare programs is not required. States may choose not to apply for federal assistance or may join in some, but not all, of the

² See Appendix to this dissent.

¹ The procedure by which HEW reviews state plans is set out in the opinion of the Court, ante, p. — n. 8.

various programs, of which AFDC is only one. That a State may choose to refuse to comply with the federal requirements at the cost of losing federal funds is, of course, a risk that any welfare plaintiff takes. Such a risk was involved in King v. Smith, 392 U.S. 309, which attacked Alabama's "substitute father" regulation as inconsistent with the Social Security Act. As long as a State is receiving federal funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds; and individuals who are adversely affected by the failure of the State to comply with the federal requirements in distributing those federal funds are entitled to a judicial determination of such a claim. King v. Smith, supra. The duty of a State, which receives this federal bounty to comply with the conditions imposed by Congress was adverted to by Mr. Justice Cardozo who wrote for the Court in Stewart Machine Co. v. Davis, 301 U. S. 548. 507-598, sustaining the constitutionality of the Social Security Act:

"Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received."

As he also said, speaking for the Court in Helvering v. Davis, 301 U. S. 619, 645, a companion case to Steward Machine Co.:

"When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."

Where the suit involves an alleged conflict between the state regulation and the federal law, neither the United States nor the Department of Health, Education, and Welfare is a necessary party to such an action. The wrong alleged is the State's failure to comply with federal requirements in its use of federal funds, not HEW's failure to withhold funds from the State.

Whether HEW should withhold federal funds is entrusted to it, at least as a preliminary matter, by § 404 (a) of the Social Security Act. Whether the courts have any role to perform beyond ruling on an alleged conflict between the state regulation and the federal law is a question we need not reach.

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³ Section 404 (a) of the Act provides: "In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

[&]quot;(1) that the plan has been so changed as to impose any residence requirement prohibited by section 602 (b) of this title, or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases: or

[&]quot;(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602 (a) of this title to be included in the plan;

[&]quot;[T]he Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure)."

APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY WASHINGTON, D. C. 20201

December 29, 1969

Mr. George R. Houston
Associate Librarian
The Supreme Court of the United States
1st Street & East Capitol, N. W.
Washington, D. C. 20543

Dear Mr. Houston:

This relates to your conversation with me on December 29 concerning statements made in the last paragraph and footnote 55 on page 91 of volume 67, Columbia Law Review, January 1967, that this Department had not responded to a complaint and petition for hearing filed by Georgia and Arkansas claimants.

The author of the Law Review article is correct. There was, in fact, no response to the request for a conformity hearing. Had we replied to the letter, however, we would have stated, as we usually do in such cases, that conformity hearings are held only on the initiative of this Department when a determination has been made that the deficiencies in a state program are such that the state, under its applicable laws, cannot, or the responsible official, will not, voluntarily bring the state into compliance.

Letters such as the one you refer to may, however, trigger action by this Department when the contents bring to light conformity matters of which the Department has not been made aware of as a result of its own audits.

To date this Department has initiated conformity hearings in connection with the state plans of Nevada and Connecticut. In view of the fact that the imposition of sanctions against states which are found to be out of conformity are mandatory, we exert every effort at our command to bring a state into conformity without the necessity of a formal hearing.

If you have any further questions, please let us know.

Very truly yours,

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Robert C. Mardian, General Counsel.

SUPREME COURT OF THE UNITED STATES

No. 540.—OCTOBER TERM, 1969

Julia Rosado et al., Petitioners, v.

George K. Wyman, etc., et al.

[April 6, 1970]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE joins, dissenting.

Petitioners are New York welfare recipients who contend that recently enacted New York welfare legislation which reduces the welfare benefits to which they are entitled under the Aid to Families with Dependent Children (AFDC) program is inconsistent with the federal AFDC requirements found in § 402 (a) (23), of the Social Security Act, 42 U.S. C. § 602 (a) (23). The New York statute which petitioners are challenging. § 131-a of the New York Social Services Law, was enacted on March 31, 1969. Little more than a week later on April 9, petitioners filed their complaint challenging this statute. The Court today holds that "the District Court correctly exercised its discretion by proceeding to the merits" of petitioners' claim that the federal and state statutes are inconsistent. Ante, at 3. The Court reaches this conclusion despite the fact that the determination whether a State is following the federal AFDC requirements is clearly vested in the first instance not in the federal courts but in the Department of Health, Education, and Welfare (HEW); despite the fact that at the very moment the District Court was deciding the merits of petitioners' claim HEW was performing its statutory duty of reviewing the New York legislation to determine if it was at odds with § 402 (a)(23); and despite the fact that if HEW had been given enough time to make a decision with regard to the New York legislation, its decision might have obviated the need for this and perhaps many other lawsuits. I regret that I cannot join an opinion which fails to give due consideration to the unmistakable intent of the Social Security Act to give HEW primary jurisdiction over these highly technical and difficult welfare questions, which affirms what is to me a clear abuse of discretion by the District Court, and which plunges this Court and other federal courts into an ever-increasing and unnecessary involvement in the administration of the Nation's categorical assistance programs administered by the States.1

Under the AFDC program, 42 U. S. C. §§ 601-610, the Federal Government provides funds to a State on the condition that the State's plan for supplementing and distributing those funds to needy individuals satisfies the various federal requirements set out in the Social Security Act. By statute, the Secretary of HEW is charged with the duty of reviewing state plans to determine if they comply with the now considerable list of federal requirements, 42 U.S.C. § 602, and his approval of such a plan, and only his approval, qualifies the state program for federal financial assistance, 42 U.S.C. § 601. So that HEW may determine whether the state plan continues at all times to meet the federal requirements, each State is required by regulation to submit all relevant changes, such as new state statutes, regulations, and court decisions, to HEW for its review. 45 CFR § 201.3. If, after affording the State reasonable notice and an opportunity for a hearing, HEW determines that the state plan does not conform to the federal requirements, the federal agency then has a legal obligation to

¹ This precise issue was not so clearly and sharply presented in King v. Smith, 392 U. S. 309 (1968), which I joined. See id., at 317 n. 11, 326 n. 23.

terminate federal aid to which the State would otherwise be entitled. 42 U. S. C. §§ 604, 1316. 45 CFR § 201.5. Waiver by the Secretary of any of the federal requirements is permitted only where the Secretary and state welfare officials have together undertaken a "demonstration" or experimental welfare project. 42 U. S. C. § 1315. The administrative procedures which the Secretary must afford a State before denying or curtailing the use of federal funds are elaborated in 42 U. S. C. § 1316, and this section also provides that a State can obtain judicial review in a United States court of appeals of an adverse administrative determination.

This unified, coherent scheme for reviewing state welfare rules and pratices was established by Congress to ensure that the federal purpose behind AFDC is fully carried out. The statutory provisions evidence a clear intent on the part of Congress to vest in HEW the primary responsibility for interpreting the federal Act and enforcing its requirements against the States. Although the agency's sanction, the power to terminate federal assistance, might seem at first glance to be a harsh and inflexible remedy. Congress wisely saw that in the vast majority of cases a credible threat of termination will be more than sufficient to bring about compliance. These procedures, if followed as Congress intended. would render unnecessary countless lawsuits by welfare recipients. In the case before the Court today it is undisputed that HEW had by the time of the proceedings in the District Court commenced its own administrative proceedings to determine whether § 131-a conforms to the Social Security Act's provisions. agency had requested the New York welfare officials to provide detailed information regarding the statute and was preparing to make its statutorily required decision on the conformity or nonconformity of § 131-a. It was at this point, when HEW was in the midst of performing its statutory obligation, that the District Court assumed jurisdiction over petitioners' claim and decided the very state-federal issue then pending before HEW. Both Judge Hays and Judge Lumbard on the Court of Appeals were of the opinion that the District Court abused its discretion in finding that it had jurisdiction over this statutory claim, and both judges relied in part on the pendency of the identical question before the federal agency. 414 F. 2d 170, 176, 181 (1969). Judge Lumbard's reasoning is instructive:

"[H]ere, as Judge Hays points out, the federal claim seems more apt for initial resolution by the Department of Health, Education and Welfare, than by the courts. The two issues upon a resolution of, which this claim turns—the practical effect of § 131-a and the proper construction of § 602 (a) (23) of the Social Security Act-both are exceedingly complex. The briefs and arguments of the parties. and the varying judicial views they have elicited, have demonstrated the wisdom of allowing HEW. with its expertise in the operation of the AFDC program and its experience in reviewing the very technical provisions of state welfare laws, an initial opportunity to consider whether or not § 131-a is in compliance with § 602 (a) (23). This is HEW's responsibility under the Social Security Act, see 42 U. S. C. A. § 1316 (Supp. 1969). I believe that the district court should have declined to exercise its jurisdiction, thus permitting HEW to determine the statutory claim asserted by plaintiffs, for the Department already had initiated review proceedings concerning § 131-a." 414 F. 2d, at 181.

I agree with the Court of Appeals that the District Court abused its discretion in taking jurisdiction over this case, but I would go further than holding that the District

Court's action was a mere abuse of discretion. Ensuring that the federal courts have the benefit of HEW's expertise in the welfare area is an important but by no means the only consideration supporting the limitation of judicial intervention at this stage. Congress has given to HEW the grave responsibility of guaranteeing that in each case where federal AFDC funds are used, federal policies are followed, and it has established procedures through which HEW can enforce the federal interests against the States. I think these congressionally mandated compliance procedures should be the exclusive ones until they have run their course. The explicitness with which Congress set out the HEW compliance procedures without referring to other remedies suggests that such was the congressional intent. But more fundamentally. I think it will be impossible for HEW to fulfill its function under the Social Security Act if its proceedings can be disrupted and its authority undercut by courts which rush to make precisely the same determination that the agency is directed by the Act to make. And in instances when HEW is confronted with a particularly sensitive question, the agency might be delighted to be able to pass on to the courts its statutory responsibility to decide the question. In the long run, then, judicial pre-emption of the agency's rightful responsibility can only lead to the collapse of the enforcement scheme envisioned by Congress, and I fear that this case and others have carried such a process well along its way. Finally, there is the very important consideration of judicial economy and the prevention of premature and unnecessary lawsuits, particularly at this time when the courts are overrun with litigants on every subject. If courts are permitted to consider the identical questions pending before HEW for its determination, inevitably they will hand down a large number of decisions which could

have been mooted if only they had postponed deciding the issues until the administrative proceedings were completed. For all these reasons I would go one step further than the Court of Appeals majority and hold that all judicial examinations of alleged conflicts between state and federal AFDC programs prior to a final HEW decision approving or disapproving the state plan is fundamentally inconsistent with the enforcement scheme created by Congress and hence such suits should be completely precluded. This preclusion of judicial action does not, of course, necessarily mean that the individual welfare recipient has no legal remedies. The precise questions of when and under what circumstances individual welfare recipients can properly seek federal judicial review are not before the Court, however, and I express no views' about those issues.2

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²The issues are canvassed in Note, Federal Judicial Review of State Welfare Practices, 67 Col. L. Rev. 84 (1967).